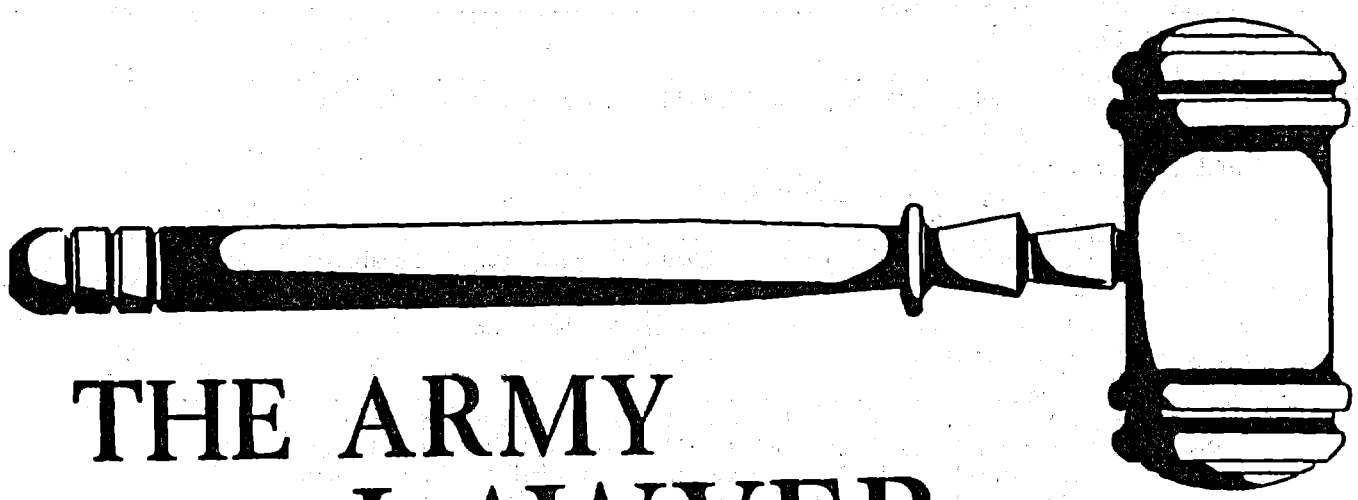

THE ARMY LAWYER

Headquarters, Department of the Army

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July 1988

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Editor
Captain Matthew E. Winter

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903–1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should also be submitted on floppy disks, and should be in either Enable, WordPerfect, or ASCII format. Articles should follow *A Uniform System of Citation* (14th ed. 1986) and the *Uniform System of Military Citation* (TJAGSA, July 1988). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

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GENERAL ORDERS
NO. 26

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC, *15 May 1988*

RESPONSIBILITY FOR LEGAL SERVICES

The following assignments of responsibility for the legal services of the Army are effective this date.

1. General Counsel of the Army. The General Counsel, a civilian attorney appointed by the President, is the chief legal officer of the Army. The General Counsel performs such functions as the Secretary of the Army prescribes. This includes the following:

a. Serving as counsel to the Secretary of the Army, the Under Secretary, the Assistant Secretaries, and other officials of the Office of the Secretary of the Army.

b. Establishing and administering, on behalf of the Secretary, the Army's policies concerning legal services.

c. Determining the position of the Army on any legal question, policy or procedure. For this purpose the General Counsel is authorized to communicate directly with any member or employee of the Army on any legal matter and to effect appropriate coordination with the Department of Defense, the Department of Justice, and other Federal agencies.

d. Providing professional guidance to all military and civilian attorneys of the Army on any legal question, policy, or procedure.

2. The Judge Advocate General of the Army. The Judge Advocate General (TJAG) is the legal adviser of the Chief of Staff of the Army, members of the Army staff, and members of the Army generally. TJAG, in coordination with the General Counsel, also serves as military legal adviser to the Secretary and other members of the Office of the Secretary of the Army. The military justice responsibilities of TJAG are specified in law, Executive Orders, and regulations; other responsibilities of TJAG are specified in law and regulations. TJAG has staff responsibility for providing legal services and for professional guidance to military attorneys of The Judge Advocate General's Corps and to civilian attorneys under his qualifying authority.

3. Army Legal Offices. Other legal offices, headed by civilian attorneys, may exist in Army organizations below the level of Headquarters, Department of the Army, such as those in the Army Materiel Command and the Corps of Engineers. Such offices are not autonomous, however, and are subject to the following policies:

a. They operate under the professional guidance of the General Counsel of the Army.

b. For matters under the jurisdiction of the Army staff or otherwise within the responsibilities of TJAG (see para 2, above), they also operate under the professional guidance of TJAG and in accordance with directives promulgated by TJAG in coordination with the General Counsel of the Army.

*This General Order supersedes GO 8, 1 April 1975.

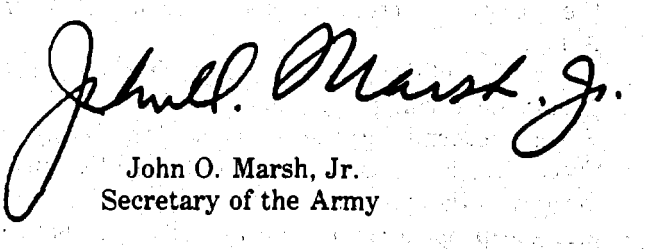
c. A new Army legal office to be headed by a civilian attorney may not be established without the prior approval of the General Counsel of the Army.

d. The term "General Counsel" may not be used to designate the head of any legal office of the Army except that of the General Counsel of the Army.

4. **Implementation.** The provisions of these orders shall be implemented by regulations, as appropriate.

5. **Rescission.** Department of the Army General Orders 8, 1975, is rescinded.

[SAAA-PP]



John O. Marsh, Jr.
Secretary of the Army

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-PT

31 May 1988

MEMORANDUM FOR: STAFF AND COMMAND JUDGE ADVOCATES AND SUPERVISORS

SUBJECT: Civilian Attorney Recruiting and Hiring -- Policy Memorandum 88-2

1. The committee which studied the management of civilian attorneys under The Judge Advocate General's qualifying authority has completed its work. The committee examined how we recruit, train, and develop our civilian attorneys, and made a number of useful recommendations. These include establishing programs to enhance internal recruiting, and centralizing some procedures for external recruiting. These proposals will depend on additional resources for implementation. In addition, based on the committee's recommendation, the Total Army Personnel Agency will study our civilian attorney positions to develop standardized descriptions where possible. This should aid recruiting and grading for these positions.

2. I am concerned about the inordinate length of time it takes to fill vacant civilian attorney positions. The committee found that the average time to fill a civilian attorney position was six months, with some actions taking as long as a year. Although some of this time is attributable to world-wide recruiting procedures, the most significant and avoidable delays were found at the local level. For example, the committee found that it took an average of 57 days from the time of knowledge of the vacancy until the draft vacancy announcement is received at OTJAG. Such delays can usually be avoided by planning ahead and by close coordination with the Civilian Personnel Office. Staff and Command Judge Advocates and other supervisors must give these matters personal attention to ensure vacant civilian attorney positions are filled promptly.

3. The committee's findings reinforce my belief that our civilian attorneys are dedicated and vital members of the Judge Advocate Legal Service. I expect each of you to be actively involved in our efforts to recruit and retain top-quality attorneys for our civilian attorney positions, and to afford them opportunities for professional development and fulfillment.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-IM 27 April 1988

MEMORANDUM FOR: ALL JUDGE ADVOCATES

SUBJECT: JAGC Automation -- Policy Memorandum 88-3

1. This policy memorandum updates guidance originally set forth in Policy Letter 85-4 which was intended to assist in implementation of the Legal Automation Army-Wide System (LAAWS).

2. I remain committed to automation as an aid in performance of our JAGC mission. Computers are invaluable tools for word processing, case management, litigation support and automated legal research. Many other uses, such as electronic tax filing and computer assisted training, offer opportunities which we have just begun to explore.

3. Automation enhances our ability to manage information and perform various law office tasks, but it also brings change and some degree of risk. As we continue to automate, we must stick with a common-sense approach that can be supported over the long term. Risk analysis and evaluation of paybacks must guide our automation investments.

4. Individual JAGC personnel, in particular our Legal Administrators, are doing an outstanding job in their new roles as Information Management Officers (IMOs). In keeping with their pivotal automation role, the Legal Administrator, or other IMO, will present a 20 to 30 minute automation status briefing as a scheduled event during every Article 6 visit.

5. The following actions are fundamental to continued progress toward our automation objectives:

a. Maintain a solid, day-to-day working relationship with your Director of Information Management (DOIM) and staff. To obtain effective support, we must clearly identify our needs and our goals. Training, telecommunications, networking, and maintenance are key support areas.

b. Continue to press for attainment of our LAAWS acquisition objectives, i.e., PC ratio of 1:1 by the end of FY88 and PC networks by the end of FY89. Every level of command should be involved, with MACOM SJAs performing a supervisory role.

c. Protect our investment in training and software development by strict adherence to LAAWS hardware and software standards. Written requests for exception to LAAWS standards must be approved by the LAAWS Product Manager. Adherence to LAAWS automation standards will be an Article 6 inspection checklist item.

DAJA-IM
SUBJECT: JAGC Automation -- Policy Letter 88-3

d. Anticipate automation-related job changes which are needed to fit our new working environment. Today's word processing center operators may become tomorrow's system administrators, computer specialists, or research technicians.

e. Develop standard operating procedures which provide for continuity of operations and fix responsibility for system security. Information is a precious resource which must be safeguarded and managed properly.

f. Continue playing a leadership role in the military community, sharing ideas and successes as we go. Maintain a steady pace, and a basic, well-reasoned, innovative approach. Use the OTJAG IMO as a clearinghouse for sharing automation plans and ideas.

g. Conscientiously enforce the terms of software license agreements and standards of conduct related to use of public property for private purposes. Integrity is key.

h. Use computers for things computers do well. Don't over-automate.

6. Your initiative, tenacity, and common-sense have made our Corps a leader in legal automation. I commend you on your past accomplishments and challenge you to build upon them in the future. Automation is essential to our continued success; this is no time to rest on our laurels.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

1988 Acquisition Law Memorandum of Agreement

On 31 May 1988, the General Counsel of the Army, The Judge Advocate General of the Army and the Command Counsel of the Army Material Command (AMC) revised a 1984 Memorandum of Understanding (MOU) that expanded the number of military attorneys in procurement law positions within AMC. The text of the 1988 Memorandum of Agreement is reprinted below.

Memorandum of Agreement

Background

In a Memorandum of Understanding (MOU) dated 31 July 1984, the General Counsel of the Army, The Judge Advocate General of the Army and the Command Counsel of the Army Materiel Command (AMC) agreed upon certain actions to increase the number of military attorneys in procurement law positions within AMC. The MOU at paragraphs 4g and 5 designated a number of senior procurement law positions within AMC to be filled with military attorneys in grades 0–4, 0–5 and 0–6. A list of the 1984 MOU designated positions is appended as Attachment A. These positions were in addition to existing military attorney positions within AMC (e.g. Chief Counsels at AVSCOM, TECOM and AMC-Europe), and those judge advocates assigned to the AMC Contract Law Specialty Program covered by a previous Memorandum of Understanding.

The 31 July 1984 MOU anticipated a need to revise the plan at some time in the future. On 1 March 1988 the General Counsel of the Army, the Deputy General Counsel (Acquisition), The Judge Advocate General of the Army, The Assistant Judge Advocate General (Civil Law) and the Command Counsel for AMC discussed revisions to the 1984 MOU. That meeting resulted in agreement to revise the 1984 MOU as follows.

Agreement

The positions designated for military attorneys under the 1984 MOU are replaced by those positions set forth in Attachment B, effective 1 March 1988. Additional military spaces required shall be furnished as indicated in Attachment B.

To assure that AMC's procurement law clients receive the required level of legal support TJAG will furnish qualified officers with acquisition law experience commensurate with the level of the position to be filled. The Army General Counsel will resolve any questions concerning officer qualifications prior to filling the position. It was further agreed that excessive delays in filling the positions would adversely impact legal support to the AMC mission and would become a matter of concern to be resolved by the Army General Counsel.

Because this agreement is premised upon the JAG Acquisition Law Specialty Program (ALS) the status of the ALS Program will be addressed by OTJAG in an annual report to the Army General Counsel. The implementation and status of this MOA will be addressed in an annual report by AMC Command Counsel to the Army General Counsel. These reports for the previous calendar year should be submitted no later than 31 January.

It was understood that this MOA will be reviewed in the future and revised as necessary to ensure the appropriate application of civilian and military legal resources to best accommodate Army Materiel Command's mission and client needs.

/s/

HUGH R. OVERHOLT
Major General, U.S. Army
The Judge Advocate General

/s/

EDWARD J. KORTE
Command Counsel
U.S. Army Materiel Command

/s/

SUSAN J. CRAWFORD
General Counsel
Department of the Army

DATED: 31 May 1988

Attachment A

MOU JAG Positions Within AMC as of 31 July 1984

Command	Position	Grade
DARCOM (AMC) (Alexandria, VA)	Adversary Proceedings	0–5
AMCCOM (Rock Island, IL)	Deputy Chief Counsel/Staff Judge Advocate	0–5
AVSCOM (St. Louis, MO)	Procurement Law	0–4
BRADC (BRDEC) (Ft. Belvoir, VA)	Procurement Law	0–4
CECOM (Ft. Monmouth, NJ)	Deputy Chief Counsel/Staff Judge Advocate	0–5
	Adversary Proceedings	0–5
	Procurement Law	0–4
	Procurement Law	0–4
DESCOM (Chambersburg, PA)	Procurement Law	0–4
ERADCOM (LABCOM) (Adelphi, MD)	Chief Counsel (see paragraph 4f MOU)	0–6
MICOM (Redstone Arsenal, AL)	Chief Counsel (see paragraph 5a MOU)	0–6
	Deputy will remain civilian (see paragraph 4g MOU)	
	Adversary Proceedings	0–5
	Adversary Proceedings	0–4
	Procurement Law	0–5
	Procurement Law	0–4
TACOM (Warren, MI)	Deputy Chief Counsel/Staff Judge Advocate	0–5
	Procurement Law	0–4
TECOM (Aberdeen Proving Ground, MD)	Procurement Law	0–4
TROSCOM (St. Louis, MO)	Deputy Chief Counsel/Staff Judge Advocate	0–5
	Procurement Law	0–4

Attachment B

MOA JAG Positions Within AMC as of March 1988

Command	Position	Grade	Agency to furnish space
AMC (Alexandria, VA)	Litigation Division	0–5	AMC
AMCCOM–R (Rock Island, IL)	Deputy Chief Counsel***	0–6	DA**
AMCCOM–D (Picatinny Arsenal, NJ)	Chief Counsel	0–6*	DA**
AVSCOM	Acquisition Law Branch Chief	0–5	AMC
	Acquisition Law	0–4	AMC
BRDEC (Ft. Belvoir, VA)	Acquisition Law	0–4	AMC
CECOM (Ft. Monmouth, NJ)	Acquisition Law Branch Chief (at VHFS, VA)	0–5	AMC
	Adversary Proceedings Branch Chief	0–5	AMC
	Acquisition Law	0–4	AMC
	Acquisition Law	0–4	AMC
DESCOM (Chambersburg, PA)	Acquisition Law	0–4	AMC
LABCOM (Adelphi, MD)	Chief Counsel	0–6	AMC
MICOM (Redstone Arsenal, AL)	Deputy Chief Counsel***	0–6	AMC
	Acquisition Law Branch Chief	0–5	AMC
	Adversary Proceedings	0–5	AMC
	Acquisition Law	0–5	AMC
	Acquisition Law	0–4	AMC
	Acquisition Law	0–4	AMC
	Acquisition Law	0–4	AMC
	Adversary Proceedings	0–4	AMC
	Acquisition Law	0–3	AMC
TACOM (Warren, MI)	Deputy Chief Counsel***	0–6	DA**
	Acquisition Law	0–4	AMC
TECOM (Aberdeen Proving Ground, MD)	Acquisition Law	0–4	AMC
TROSCOM (St. Louis, MO)	Acquisition Law	0–4	AMC

*The AMCCOM–D (ARDEC) Chief Counsel position will be converted to a JAG 0–6 position no later than 1 March 1993.
**HQDA will provide the billet to AMC with appropriate ODP support. AMC will initiate action to obtain the authorized spaces.
***Deputy Chief Counsels will have significant acquisition law responsibilities; Acquisition Law Division Chiefs will not be replaced.

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

6 JUN 1988

JAGS-GRA

MEMORANDUM FOR: STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Model Mutual Support Training Plan

1. The enclosed Model Mutual Support Training Plan has been prepared to assist active component SJAs and JA officers and reserve component JA activities in devising and implementing meaningful mutual support training programs.

2. While I expect this plan to be disseminated to all staff and command judge advocates and all JAGSO commanders, team directors, and judge advocate section leaders in non-JAGC units, I desire to avoid additional administrative burdens. Care must be taken to ensure the understanding that the plan is advisory and must not be followed dogmatically in conflict with good judgment and common sense.

3. It is important that mutual support training under this plan be monitored and evaluated if we are to assess its value and adjust for improvement. Active and Reserve elements involved in mutual support training will submit evaluations to the CONUSA SJA annually who will provide an annual evaluation to the FORSCOM SJA with copy furnished to the Guard and Reserve Affairs Department, TJAGSA.

William K. Suter

Encl

WILLIAM K. SUTER
Major General, USA
Acting The Judge Advocate General

Model Mutual Support Training Plan

1. Purpose

a. The intent of this model training plan is to broaden opportunities for Mutual Support Training (MST), provide effective administration, and establish a systematic procedure for training development primarily in an "IDT" setting. Procedures for annual training for units are prescribed in Appendix C to FORSCOM Circular 27–87–1.

b. This plan applies to judge advocates (JAs) in active component (AC) and reserve component (RC) units. The provisions in this plan apply equally to JAGSOs and JA sections of other TPUs in the USAR and ARNG.

2. References

a. AR 11–22, Mutual Support and Equipment Sharing Program, 15 August 1982.

b. AR 27–4, Judge Advocate General Service Organization: Organization, Training, Employment, and Administration, 1 January 1981.

c. AR 135–316, Reserve Components Judge Advocate Training, 26 June 1973.

d. AR 140–1, Army Reserve Mission, Organization, and Training, 1 February 1985.

e. AR 140–145, Army Reserve Individual Mobilization Augmentation Program, 15 July 1983.

f. FORSCOM Circular 27–87–1, Legal Services, Reserve Component (FC) Legal Training Program, 1 April 1987.

g. TJAG Policy Memo 87–6, Subject: Individual Mobilization Augmentee, Individual Duty Training.

h. Article, "Management of Your IMAs," *The Army Lawyer*, June 1987, at 53.

3. Training

a. Training is the primary peacetime task of RC JAs and Judge Advocate General Service Organizations (JAGSOs) in preparation for mobilization.

b. Training RC JAs is an important peacetime responsibility of AC SJAs.

c. The type of training available to RC JAs are:

(1) Formal technical training provided by TJAGSA and other service schools, and

(2) Mission-oriented training.

Both may be performed within the framework of existing reserve training status (active duty (AD), including annual training (AT); active duty for training (ADT); paid inactive duty training (IDT); and IDT for points only.)

d. This plan focuses on mission-oriented training which includes performance of OJT in active JAGC offices, performance of legal missions within JA sections of non-JAGC units, or performance of other legal services for various elements within the Total Army authorized by the Mutual Support Program. Participating in actual JA tasks allows the individual to obtain hands-on experience and reinforces TJAGSA technical training.

e. Accomplishment of the Judge Advocate General Service Organization Standardized Training Tasks (Appendix B, FORSCOM Circular 27–87–1) can be achieved through technical training and mission-oriented training and can be complemented by a Mutual Support Training Program.

4. Mutual Support Training

a. Philosophy of Mutual Support Training.

(1) Mutual Support Training (MST) is prescribed by AR 11-22 which supports innovative working relationships between AC, USAR, and NG elements that are mutually beneficial. MST should be designed to improve the mission capability of the RC, while simultaneously assisting the AC to accomplish its mission. In appropriate circumstances, it may extend to the other branches of the Armed Forces.

(2) MST must not be a one way street providing only a resource to the AC. In planning MST, AC and RC JAs should select support activities that will provide training opportunities designed to prepare RC JAs for their mobilization mission. JAGSOs and JA sections of other TPUs (USAR and ARNG) should receive practical, hands-on training in their particular specialties which can be recorded in reports reflecting required standardized training.

(3) Continual supervision by the AC is essential to a good MST program.

(4) Although legal assistance by RC JAs is an appropriate element of a MST program (para. 7b(9), AR 11–22), the best MST program will encompass all areas of military legal practice.

b. Scope of Mutual Support Training.

(1) MST may involve an ongoing arrangement or a one-time project.

(2) Although MST typically involves unit JAs, it may include IMAs or JAs assigned to control group reinforcement (IRR). This model plan focuses on the unit rather than the IMA and IRR. For more information on use of IMAs in mutual support, see references 2g and 2h.

5. Implementation of a Mutual Support Training Program

a. CONUSA SJAs implement the MST within their CONUSAs. The CONUSA SJA will assist in identifying appropriate JA reserve or active elements.

b. When the RC and AC have communicated on the matter, the CONUSA SJA will ensure appropriate matches upon review of the MST project or ongoing arrangement.

c. A request for MST originating from OTJAG will be passed through FORSCOM (FCJA–ML) to the CONUSA SJA. Active Component SJA requests may be presented directly to the CONUSA SJA. Reserve Component JA requests will be forwarded to the appropriate CONUSA SJA.

d. The FORSCOM SJA will be provided information copies of all MST agreements. Where improper matches are evident, the FORSCOM SJA will assist in devising a more desirable arrangement.

e. During mutual support negotiations, the AC representative will be advised of the expertise, strengths, weaknesses, number of personnel involved, unit mission, and training needs and expectations of the Reserve unit. The RC representative should be informed of the AC mission as well as specific areas suitable for MST. The provisions of paragraph 6a(2), reference 2f or its successor, will be followed in developing AT at AC installations.

6. Preparation of Memorandum of Agreement

a. Once both components have agreed that mutual support training will be performed, the AC SJA will initiate a memorandum of agreement or other appropriate writing reflecting agreement of the parties which will be executed by the AC and RC parties. The following items will be included in the memorandum:

(1) Identification of action officers or liaison officers for each component.

(2) Plan of operation, to include procedures and types of duties and security measures to be performed by both RC and AC.

(3) Support to be provided by each component, including equipment, TDY funding, billeting and meal costs, etc.

(4) Responsibility for preparation of a schedule for training plans.

7. Preparation of Training Plans

a. Training plans will be initiated by the AC and prepared in accordance with the memorandum of agreement. The following items will be included:

(1) Dates, times, and locations for the mutual support training sessions.

(2) Substantive duties for the RC and training and supervisory duties for the AC during each session. If feasible the training plan should provide for "hands-on" training essential to the mobilization mission of the RC unit. It should include training compatible with standardized training set forth at Appendix B FORSCOM Circular 27–87–1 for the type of RC unit doing the MST. For example, a training plan for a trial team should include items from the standardized training tasks (Appendix B, FORSCOM Circular 27–87–1) such as reviewing confinement packets for legal sufficiency, preparing/reviewing court-martial charge sheets, drafting specifications/charges and preparing pretrial advice.

(3) Assignment, if practical, for each RC soldier and a description of the degree of coordination and supervision required for the performance of duties pursuant to the assignment. The plan may designate AC JAs to brief and assign duties.

(4) Training to be provided in addition to MST.

(5) Method of evaluating the session.

b. Execution.

(1) Prior to commencement of MST, the AC will conduct an orientation for the RC, to include a tour of facilities, a briefing on the AC organization, missions, and the overall MST arrangement.

(2) RC and AC units will coordinate closely to ensure compliance with the spirit of the memorandum of agreement and training plans and be ready to improvise solutions for situations not encompassed by the memorandum of agreement or training plans.

8. Evaluation

a. FORSCOM SJA and CONUSA SJAs will review the MST program to ensure compliance with this plan.

b. All MUSARC and AC SJAs involved in MST will submit annual progress evaluations (letters) to the CONUSA SJA detailing the nature and amount of MST, evaluating the quality of the training, and making any other appropriate comments. The CONUSA SJA will consolidate the evaluations and forward his evaluation to the FORSCOM SJA with copy to The Judge Advocate General's School, ATTN: JAGS–GRA.

Opening Remarks for the General Counsel's Conference June 1988

The Judge Advocate General's School recently hosted the Army General Counsel's Conference. The purpose of the conference, which was organized by Susan J. Crawford, General Counsel of the Army, was to gather senior Army lawyers together to discuss common concerns. Mrs. Crawford delivered the following remarks during the conference:

Let me welcome each of you to this, our first Army General Counsel's Conference. This type of a conference has been a dream of mine for some time.

As you all know, for the past several years my staff and I have visited each of your very fine legal conferences—from the world-wide JAG conferences here in Charlottesville—to Command-wide AMC and Corps of Engineers sponsored functions.

Never before, however, during my tenure in the General Counsel's office, have we ever gathered together *all* of the Army's senior lawyers under one roof, at the same time, to discuss matters of mutual concern.

Let me begin by thanking Colonel Rice and his staff for all that they have done to host this conference for us. We are extremely grateful for their assistance and their efforts.

There is no question that every Army lawyer should take great pride in the very fine reputation this school has. I believe that the recent authority—granted by the American Bar Association and the Congress to the JAG School—to award the LLM degree is indicative of the high esteem in which this school is held both within and outside the Army.

When my deputies and I began planning this conference last year, we made several fundamental decisions:

First, the conference should be close to Washington, easy to reach, and last a relatively short time to encourage maximum participation.

Second, we would invite only the most senior Army lawyers who manage and control the Army's legal business on a daily basis. We wanted a small, influential group to attend; obviously, we succeeded.

Third, we would pick a theme that would cut across several spectrums of our legal practice. We would cover topical issues that the Army faces even as we speak.

And fourth, we would make the conference as collegial and participatory as possible, including speakers and conferees from as many offices and with as many perspectives as possible.

That is why the invitation asked each of you to be prepared to address problem areas that may exist in your own organization. I urge you to share your questions, concerns and views during the formal sessions as well as during the social occasions.

In this day and age when Soviet and American relations reflect a thaw in the Cold War atmosphere that existed earlier in this decade, I also sense a thaw throughout the Army legal community.

I believe that there is more willingness to address some of the very tough issues that we all face, as well as to engage in frank discussions about what needs to be done, even at the expense of challenging some sacred cows that we all recognize.

In fact, following the spirit of the President's recent summit in the Soviet Union, I would have to say that I sense a spirit of "glasnost" and "perestroika" within the Army legal community.

As many of you know, I have often said that there is more than enough legal business in our Army to go around, and I am more than happy to share that business. I believe that we serve our clients best when we put aside parochial or turf interests and look instead to the greater good of the Army, the Defense Department, and our nation.

After all, it is ultimately the American people whom we are here to serve—and that is true whether we are military or civilian.

It reminds me of a saying I once heard in the Pentagon that there is simply no end to what we can accomplish if we do not care who gets the credit!

I believe that our willingness to face and tackle difficult issues together is a strength that will lead us to closer relations among all Army lawyers.

While differences may, and should be aired among ourselves, I believe that the long term effect of our efforts to work closer together will ultimately provide us with a clearer insight into how we can improve our legal services to the client that we all share, the United States Army.

Let me mention several examples of the trend toward thinking of ourselves as a family of lawyers serving a common client.

First, OTJAG and OGC recognized the need for closer relationships in solving the problems facing the Intelligence and Special Operations communities. We realized that we had to have daily professional contact between our offices to ensure that the senior civilian and military leaders were well served.

From the Yellow Fruit scandal to the Iran-Contra affair, the Army has taken the lead in reforming its own regulations and procedures. I am very proud to say that Army lawyers have led the way. The Army has virtually escaped criticism in this area, because Army lawyers assumed the lead in identifying what needed to be done, and following through on the tough decisions that had to be made.

Second, the need for more JAGC support to the AMC community has led to a new set of understandings between The Judge Advocate General and the Command Counsel.

I am confident that our recently completed memorandum of agreement in this area will provide JAG attorneys an enhanced opportunity to develop an acquisition legal specialty under the tutelage of experienced AMC lawyers. Judge advocates will also share in the responsibility of serving in key leadership positions.

Third, the expansion of legal services within the Office of the General Counsel has provided an opportunity to pull together members from all sectors of the Army legal community to serve in OGC.

In the last year and a half, OGC has staffed new positions by hiring a senior civilian from OTJAG, two senior civilian attorneys from the Corps of Engineers and one senior civilian attorney from AMC.

When you add to that the fact that all three career OGC deputies are former active duty judge advocates and distinguished graduates of the graduate course of this school—and that two are reserve Lieutenant Colonels—OGC truly reflects the experience and background of the entire Army legal community.

Fourth, the commissioning of the studies to evaluate the delivery of acquisition and environmental legal services to the Army has provided an opportunity for critical analysis of the directions we need to consider in view of our client's emerging interests.

Both studies have long and short range implications for everyone in this room. And—while the conference will not deal with the studies during formal sessions—some of the issues that will be discussed during the next day and a half are forcing us to come to grips rather quickly with how we task organize to provide legal services.

Finally, the senior Army leadership—both civilian and military—has recognized the important policy role that Army lawyers play in dealing with the most troubling issues facing the Army today. We are called upon to be a community of lawyers providing counsel in every area of the Army's business.

Although the focus of this conference is on acquisition, we could just as easily have focused on intelligence and special operations, civilian and military personnel, standards of conduct, environmental law or any other number of topics that challenge the Army every day.

But I would say that we are called upon to be more than the traditional lawyer providing traditional legal advice. Rather, we are called upon to be lawyers who understand the Army's business.

We must seek to shape and formulate legal and policy matters in such a way that the Army can continue to perform its mission. This is especially critical in an era when we know we are facing potential cutbacks in military funding.

In summary, the role I see for all of us as Army lawyers is like that of an extended family. We may have different homes, different specific missions, and different perspectives; but we all share a common heritage that dates back to William Tudor, the first Judge Advocate General of the Army.

And we all share a common goal—providing the Army the best legal advice possible.

In providing this advice, we are called upon to provide each other mutual support, rather than parochial perspectives. We are called upon to provide unity of effort, rather than organizational turf battles.

This does not mean that we cannot and should not disagree as policies are being formulated and decided; families do that during the course of their development as a family unit.

But once the decisions are made, it becomes our professional duty to implement and defend the decisions as good lawyers have always done.

As you know, I believe that building a consensus among the senior lawyers is the best approach to resolving our problems. Out of shared wisdom and experience come ideas and solutions that few of us can create by ourselves.

I trust that this time together will provide an opportunity to do just that—share, reflect, and expand our insight into the issues we address on a daily basis.

One of my favorite quotes that summarizes this philosophy is as follows: "We may have arrived on different ships, but we are all in the same boat now."

In closing, I want to thank you for coming, and tell you how much I appreciate the outstanding leadership and legal advice you provide the Army every day. You represent the pinnacle of the Army's legal profession—the best hope that the Army has for continued success in creating and defending the legal framework that supports the Army mission.

You don't always get the recognition you deserve, but rest assured that the Secretary of the Army supports you and your valuable work.

The SJA in the Emergency Operations Center: Advising the Commander During a Counterterrorism Operation

*Major Kevin R. Hart**
Office of the Judge Advocate, International Law, USAREUR

They're Here!

It begins in darkness. The telephone rings and a voice says: "Sir, this is the Installation Staff Duty Officer. The Commander has ordered the EOC activated immediately at level one manning. All primary staff on the CMT will report for a meeting in thirty minutes in the headquarters conference room." The Staff Duty Officer will give no more details. As the Staff Judge Advocate (SJA) dresses, the questions begin to come fast and furious. Does he alert the entire office? Who will he need for the EOC operation? Do his people know how to get there and what to do when they arrive? Are the access rosters current? The SJA makes a quick call to his deputy—he will have to solve these problems.[1] The short ride to the main gate confirms that something serious has happened. Instead of the lone military policeman usually on duty at this hour, there are six MPs with M–16s stopping every vehicle. Several of them are wearing helmets and load-bearing equipment (LBE). Two are still in civilian clothes, attesting to the haste with which the MP company reacted. As the SJA arrives at the conference room, the Deputy Installation Commander (DIC) begins the meeting:

> For you people that just arrived—there has been a terrorist incident on post. There are casualties and there is a hostage situation in progress at building 8638. The Provost Marshal (PM) will update you on the details after I finish. I want to brief the boss in forty-five minutes with a recommended course of action. We won't have time for an elaborate staff action. The boss will want answers—let's get it right the first time!

An unreasonable demand? Perhaps, but it is not an unrealistic one. To date, there has not been a major terrorist attack directed against an Army installation in the continental United States (CONUS). The threat, however, is real. The most costly (in dollars) terrorist attack against U.S. military forces occurred on January 12, 1981, when Macheteros terrorists destroyed nine A–7 aircraft (valued at forty-five million dollars) at Muniz Airport, in Puerto Rico.[2] If terrorists attack an Army installation, the success of the counterterrorism response will depend on the degree of commitment, planning, and training of the soldiers by the installation commander and his staff.

The purpose of this article is to identify the more significant legal and organizational issues facing the installation

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[1] This article uses the words he and its derivatives generically to refer to both male and female.

[2] T. Tompkins, Military Countermeasures to Terrorism in the 1980's, at 1 (1984). The most costly terrorist attack against U.S. military forces in terms of lives lost, of course, was the bombing of the headquarters of Battalion Landing Team 1/8 at the Beirut International Airport on October 23, 1983.

SJA when the command attempts to respond to the terrorist threat. This response, the counterterrorism (CT) operation, will be the focus of national and possibly world media attention. Proper preparation by the SJA and his officers will require hours of in-depth planning, most of it in coordination with other staff sections. The problem areas must be identified and resolved, detailed plans written, and solutions rehearsed before the first shots are fired. Incomplete preparation will be an invitation for failure when confronted by an intelligent, ruthless, and completely dedicated foe.

Concept of the Operation

A CT operation is not a combat operation. Every senior line officer in the Army has continually been taught how to plan and execute a combat operation. He knows who does what and how the chain of command works. He fights in concert with, and reports to, the unified command that controls his unit in wartime. United States national policy, Department of Defense (DOD), and Department of the Army (DA) guidance, however, along with the nature of the terrorist problem, have made significant changes to the way military organizations conduct a CT operation. In the United States, for example, Army installations communicate along service lines to the Department of the Army and their respective Army major commands (MACOM). The CT operation itself is essentially a law enforcement operation rather than a combat operation. The G2 and G3, even in their dual hat installation roles as Director of Security (DSEC) and Director of Plans, Training, and Mobilization (DPTM), respectively, are no longer the paramount staff advisers. The commander must now call upon the PM, SJA, and Public Affairs Officer (PAO) to prepare critical portions of the operational plan and answer the bulk of the difficult questions.

TRADOC Pamphlet 525–37 divides CT operations on CONUS military installations into three phases.[3] The distinction between phases depends on the type and level of CT forces committed. This commitment, in turn, is a response tailored to the terrorist threat presented.

The issues that follow are not an exhaustive list, and are restricted to an on-post terrorism scenario within the United States. Terrorist incidents that occur either off the installation or overseas create additional legal issues that this article does not identify or resolve.

Issue 1—*Is it a terrorist incident?*

Although he will probably "know it when he sees it," the SJA should satisfy himself that the incident is a "terrorist incident." One DOD directive defines a terrorist incident as: "a distinct criminal act committed or threatened to be committed by a group or single individual in order to advance a political objective, and greatly endangering safety or property."[4] More recent DOD and DA publications emphasize two components of terrorism, coercion and motivation. DOD Directive 2000.12 defines terrorism as the "unlawful use or threatened use of force or violence . . . for coercing or intimidating governments or societies often for achieving political, religious, or ideological objectives."[5] The most current Army terrorism regulation omits any specific reference to governments from its definition, but defines terrorism as "the calculated use of violence or the threat of violence to attain goals, political, religious, or ideological in nature" by an act that "is often symbolic" and "intended to influence an audience beyond the immediate victims."[6] The common elements are the political, religious, or ideological motivation of the assailants and the intent to influence or coerce, if not a government, then a society or societal group. Thus, an estranged husband who holds his family hostage at gunpoint in government quarters is not a "terrorist" by DOD or DA standards. Nor is the soldier who decides to hold up the installation credit union for extra cash. These may be extremely serious incidents for which the commander may wish to activate the Emergency Operations Center (EOC) and Crisis Management Team (CMT), but they are not incidents that require the application of DOD or DA policies, rules, and reporting procedures specially designed for terrorist incidents. Even in serious situations devoid of terrorism, however, the SJA must ensure that the installation meets the Serious Incident Report (SIR) system requirements of AR 190–40.[7]

Issue 2—*Who's in charge?*

Failure to clearly define the command relationships among the various military organizations involved in a CT operation and between the military commander(s) and the Federal Bureau of Investigation (FBI), (the federal "lead" agency with the primary law enforcement responsibility for terrorist incidents in the United States), will inevitably lead to disaster.

A CT operation requires the coordination of several different military units and organizations on the installation.

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[3] U.S. Army Training and Doctrine Command Pam. 525–37, Military Operations: U.S. Army Operational Concept for Terrorism Counteraction, para. 3–3c (Mar. 19, 1984) [hereinafter TRADOC Pam 525–37].

[4] Dep't of Defense Directive 3025.12, Employment of Military Resources in the Event of Civil Disturbances, para. IV B (Aug. 19, 1971) [hereinafter DOD Dir. 3025.12].

[5] Dep't of Defense Directive 2000.12, Protection of DOD Personnel and Resources Against Terrorist Acts, para. C 4 (July 16, 1986) [hereinafter DOD Dir. 2000.12].

[6] Army Reg. 525–13, Military Operations-The Army Terrorism Counteraction Program, Glossary, Section II (4 Jan. 1988) [hereinafter AR 525–13].

[7] Army Reg. 190–40, Military Police-Serious Incident Report, para. 1–4*b*(4) (14 Aug. 1985) [hereinafter AR 190–40] actually lists terrorism as a category 1 serious incident. Should an actual terrorist incident occur, however, the reporting requirements listed in AR 525–13, para. 4–3, including the preparation of a terrorist incident report (TIR) or terrorist threat report (TTR), must be followed in addition to those reports required by AR 190–40. Other examples of how the definition of a terrorist incident will determine what guidance the Army must follow are two federal law enforcement agreements between DOD and the Department of Justice (DOJ). The Memorandum of Understanding Between the Department of Defense, Department of Justice and the Federal Bureau of Investigation, Subject: Use of Federal Military Force in Domestic Terrorist Incidents (Aug. 5, 1983) [hereinafter terrorism MOU] would apply to all legitimate "terrorist" incidents, while the Memorandum of Understanding Between the Department of Justice and Department of Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments have Concurrent Jurisdiction (July 19, 1955), would apply to other serious federal criminal incidents on the installation.

These usually include the installation staff elements constituting the EOC and CMT, the military police, and other special elements that compose the Threat Management Force (TMF), the "combat power" of the CT force.[8] It is clearly an ad hoc organization. Normal command lines must be quickly severed. Members of the TMF, for example, may come from different tenant units on the installation, but should only respond to the TMF commander, who must isolate them from other senior officers who may try to influence the operation. The TMF commander, in turn, will respond directly to the installation commander.[9]

Of more immediate concern for the SJA will be the relationship between the installation commander and the FBI. The 1983 DOD/DOJ/FBI terrorism memorandum of understanding (MOU) is the primary source document.[10] This memorandum makes the following policy determinations:

—The FBI must be notified immediately and may, as the Attorney General's designee, assume jurisdiction and overall control and coordination of the federal response. (Command of military forces will remain with the military commander(s) at all times.)

—Until the FBI assumes jurisdiction, the installation commander will respond with necessary and lawful steps to protect lives and property.

The Army Terrorism Counteraction Program regulation, AR 525–13, adds the following specific guidance:

—Installation security forces will isolate, contain and neutralize the incident.

—Command of US Army forces will remain within military channels.

—The senior FBI official will establish liaison with the command center of the installation. If the FBI assumes jurisdiction, it will coordinate the use of FBI assets to resolve the incident.

—If the FBI declines jurisdiction, FBI agents may act as advisors to the military commander(s).[11]

There are, however, unresolved "grey" areas. Of particular importance are the following:

—Will the Special Agent in Charge (SAC), the on-site FBI "commander," bring in significant FBI assets (e.g., command and control personnel and equipment, SWAT teams, or hostage negotiation teams) or will he use the military assets already in place?

—If military assets are used, will FBI personnel direct the efforts of the negotiating team or actively participate in preparing plans that call for employing other TMF assets, such as the military police special reaction team (SRT)?

—If the FBI brings in a sizable command and control staff, where will they locate? What communication requirements will they have? What will be their links to the EOC and CMT to ensure proper coordination with the military chain of command?

—Will the SAC coordinate his actions closely with the installation commander and staff and how much authority will the SAC actually have in relation to his superiors in Washington?

The answers to these questions are not easily determined and each terrorist incident may call for a different solution. Contingency plans must nevertheless be prepared. The installation PM, assisted by the SJA and CID commander, should coordinate directly with the FBI office that would normally respond to an incident on their installation. Newly arrived installation commanders should meet with the SAC and discuss local implementation of the MOU. The installation's crisis management and security plans should address the local implementation of the MOU, especially in terms of the communications, workspace, and other logistical requirements of the FBI. The average installation EOC is barely large enough to adequately support the installation staff without the addition of FBI personnel. Of equal importance is the necessity for combined training. Military and FBI personnel should train together, to develop their ability to respond jointly to the terrorist threat.[12]

Issue 3—*Who advises the commander?*

In those FORSCOM installations that host large combat units, there may be a tendency for the corps or division G-staff to step forward and direct the planning effort in an emergency. A CT operation, however, is an installation function performed by the installation staff. Representatives from the installation staff serve on the CMT, which the Deputy Installation Commander (DIC) usually chairs. This group constitutes the "brains" of the CT operation. They are the crisis management advisors to the commander.[13]

A few of the key members of the CMT are "dual hatted" (i.e., they perform similar functions on the staff of the corps or division tenant unit). These include the G3/Director of Plans, Training, and Mobilization (G3/DPTM) and the SJA.[14] Many of the members, however, are solely on the installation staff and some are civilians. These members may not have worked together as a staff very often. There

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[8] Dep't of Army, Training Circular 19–16, Countering Terrorism on U.S. Army Installations, at 9–5 (Apr. 1983) [hereinafter TC 19–16].

[9] *Id.* at 9–9.

[10] This MOU is reprinted in Dep't of Army, Field Manual 100–37, Terrorism Counteraction, at A–1 (July 1987).

[11] Terrorism MOU, *supra* note 7, Article VI; AR 525–13, para. 5–1; *see also* Jackson, *Legal Aspects of Terrorism: An Overview*, The Army Lawyer, Mar. 1985, at 1, for a more detailed discussion of the MOU.

[12] Although AR 525–13 does not directly require FBI participation in training, it encourages exercise planning utilizing TC 19–16, which does emphasize close cooperation with the local FBI office. *Compare* AR 525–13, para. 2–15c *with* TC 19–16, at 9–5, 9–6, and 9–10; *see also* U.S. Army Forces Command/Training and Doctrine Command, Supp. 1 to Army Reg. 190–52, Military Police: Countering Terrorism and Other Major Disruptions on Military Installations, para. 2–2*a*, (1 Jan. 1984) [hereinafter FORSCOM/TRADOC Supp. 1 to AR 190–52], which requires coordination and advanced planning to include FBI participation as negotiators. Note—at the time of this writing, the newly-published Army terrorism regulation, AR 525–13, has not yet been supplemented by FORSCOM or TRADOC. This article will therefore assume the requirements specified in the old supplement are still valid.

[13] TC 19–16 describes the makeup of the CMT on pages 9–5 through 9–7.

[14] This statement is true for installations hosting a corps headquarters. On installations hosting only a division, however, the installation SJA may be an 0–6 occupying a TDA position rather than the "Division SJA," which is a TOE 0–5 position filled by the DSJA.

may be increased uncertainty about how to function, a lack of clear knowledge about who is responsible for what tasks, and a greater possibility for friction than on the G-staff. Regular terrorism exercises are the only sure way to increase the CMT's ability to efficiently function.[15]

Issue 4—*Is the Office of the Staff Judge Advocate (OSJA) ready?*

Terrorists plan to strike without warning. The SJA cannot wait for a terrorist warning to begin to think about organizing his office to meet the demands that will be placed on it by a CT operation. The SJA must make sure the right personnel are notified and trained and the necessary legal materials are collected and ready for use.

Staffing Unless the SJA office is a one-attorney operation, the SJA must identify how many attorneys and clerks will be needed and who they should be. The SJA should always appoint himself to the CMT, to be with the other installation staff principals. The EOC must also be manned by a judge advocate, preferably the office "terrorism" expert, as this attorney will necessarily be the key advisor to the SJA. A third attorney and an enlisted driver should be available at the office to answer telephones, coordinate shift changes, and handle contingency problems should they arise. Finally, a fourth attorney may be needed by the PAO at the press center to prepare guidelines and oversee the public affairs plan.

When a terrorist incident occurs, there will be a crisis atmosphere with little thought given to the need to sustain personnel for a prolonged period of perhaps a week or more.[16] The SJA, as well as all staff principals, should plan twelve hour shifts. This means that trained personnel must be available in sufficient numbers to effectively represent the SJA at all times, day or night. A staffing arrangement could be as follows:

Location	Shift 1 (Day)	Shift 2 (Night)
CMT	SJA	DSJA
EOC	Ch, Opns Law[17]	Attorney
OSJA	Attorney/Driver	Same
Press Center	Attorney (Day Only?)	

Preparation of documents and materials The SJA should make sure that all access rosters and security clearances are not only up-to-date, but are in the possession of the agencies that require them. This is especially true of the EOC. The EOC should be one of the areas a new SJA visits. During this visit, the SJA should determine whether the EOC staff can find the OSJA access roster. If they can, is it up to date?

The SJA EOC representative should carry with him notebooks or folders of terrorism-related legal materials organized for quick reference. These materials need not be an all-inclusive research collection (there won't be room for it inside the EOC) but should be an easily transportable file of the most important documents pertaining to legal issues likely to arise during a CT operation. The appendix contains a suggested list of documents capable of fitting into two or three large ring binders. The Deputy Staff Judge Advocate (DSJA) and the SJA will be required to war game issues and focus on their priorities as they choose and assemble these documents.

Issue 5—*Does the EOC/CMT function efficiently?*

The EOC is a command center. It usually consists of a large (or not so large) room or a series of connected rooms that are secure. Small work stations with individual telephones may be available for many of the installation staff sections. There are also secure communications facilities located in the same or an adjacent room. The physical facilities available at the EOC should allow the following:

—Adequate workspace for at least one staff representative from each of the staff sections represented on the CMT.

—A telephone (unsecure) available at each work station with off-post and autovon capabilities.

—Access to secure communications (shared with other staff sections).

—A layout conducive to frequent briefings and updates. For this, an unpartitioned large room is desirable so that one briefer can address everyone at their work stations with a minimum of disruption.

—Unrestricted access to the CMT. The CMT will normally meet nearby. Creation of a separate secure area should be avoided since it will unnecessarily hinder communications between the SJA representative in the EOC and the SJA on the CMT.

While the SJA may not be able to greatly influence the physical facilities available at any installation, he can ensure that he and his attorney in the EOC understand their respective roles. The EOC representative is an action officer. This attorney must perform two vital functions:

—Gathering the facts.

—Identifying the potential legal issues.

Performing these functions requires an attorney who listens to what is going on in the EOC and asks the appropriate questions of other staff sections until the facts are clear.

[15] Annual terrorism exercises, now required by AR 525-13 and required since 1984 by FORSCOM/TRADOC Supp. 1 to AR 190-52, provide such a training opportunity.

[16] TC 19-16, at 10-9, advocates planning for the "worst possible scenario"—a prolonged hostage situation. In conversations with the author, FBI agents have pointed out that sustaining the alertness and concentration of their personnel is one of their priorities in training exercises.

[17] Army Reg. 5-3, Management: Installation Management and Organization, para. 4-5*h* (20 Nov. 1986) [hereinafter AR 5-3] assigns the counterterrorism mission to the Chief, Operations/International Law Division. If the Office of the Staff Judge Advocate (OSJA) is organized differently, the main terrorism expert should be placed at the EOC.

These are the facts and issues that the SJA on the CMT must consider to help plan the CT operation.[18]

Issue 6—*Are the planning documents adequate and up to date?*

Installation plans and section SOPs constitute the installation's institutional memory on how to defend itself against terrorism.

Plans—There are two related installation plans that the SJA must review and, when necessary, help prepare or update. These are the installation security plan and the counterterrorism crisis management plan (CCMP), both of which are required by Army regulations.[19] The installation security plan must be specifically tailored to the installation. It details the way the installation's security system works, individual responsibilities, what areas are restricted or require special security precautions, and how force, to include deadly force, may be used. The SJA must pay particular attention to the issue of how, where, and when force may be used by the military/DOD police and the installation interior guard force.[20]

The CCMP is the central planning document in a CT operation. It describes how to organize and control a CT operation, and who makes up the CMT, EOC, and TMF. The SJA must ensure that this plan contains detailed instructions to coordinate the operation. For example, does the plan list the SJA as a member of the CMT? Will the SJA be among the first staff officers called in the event of a terrorist incident? Does the plan specifically assign to the MPs, the CID, or the EOC staff the responsibility to notify the FBI once the MPs have verified that terrorists are present on the installation? The SJA may want to add an annex to the CCMP explaining some basic legal concepts, such as the procedures for arresting and detaining civilians or the jurisdictional relationship between the FBI and military. The annex could even contain a list of actions that the SJA wants other staff sections to coordinate with him.

SOPs—Two SOPs are most important: the SJA Office SOP and the EOC SOP. The SJA Office SOP should detail some of the basic organization issues already discussed in this article, including who is responsible for preparing the relevant installation plans, assembling and updating the terrorism legal materials, staffing positions during a terrorist incident, and updating access rosters. The Operational/International Law Division (or other division entrusted with the CT function if the OSJA has an approved exception to AR 5–3) may also wish to prepare a separate SOP annex listing legal issues. This can be added to the collection of terrorism legal materials.

The SJA Office SOP should also contain or refer to an EOC "desk" SOP which may be located in the SJA's work station or in the folder of terrorism materials. This short document can describe the EOC routine for an inexperienced attorney. For example, this SOP may require the SJA representative to ensure that the EOC has transmitted the messages required by Army and MACOM regulations on time. Or, it may require that the SJA representative check the incoming and outgoing message files every two hours for misrouted messages.

The SJA should also review the EOC SOP to make sure it is adequate. This could be a sensitive subject, because the Plans and Operations Division of the Directorate of Plans, Training, and Mobilization (DPTM) runs the EOC and prepares this SOP.[21] Nevertheless, the EOC has important functions to perform upon activation that cannot await the arrival of the staff section representatives. The EOC is the installation command center. The SOP, therefore, must contain the reporting procedures required by higher headquarters.[22] It should also contain detailed plans of how the center will communicate with the TMF headquarters and other critical locations, unless the CCMP already describes these details. The SOP should also include how to set up a closed circuit TV system so that real time pictures of the incident scene can appear on the monitor in the EOC (and also on monitors set up in the TMF headquarters and CMT deliberation room, if feasible).[23] Responsibility for preparing event, intelligence, and forces committed logs, and for logging and distributing message traffic should be included. The SOP should also answer questions such as:

—Who in the EOC will communicate with the Army and MACOM operation centers?

—How will the EOC communicate with the FBI on post?

—Who will have the authority to release messages in the EOC? Although none of these issues are technically the responsibility of the SJA, his ability to properly advise the commander and ensure a smooth flow of information depends on the proper functioning of all personnel on the EOC staff.

Issue 7—*Are there clear, concise, and lawful rules of engagement and use of force instructions?*

One of the most important services an SJA can perform in a CT operation is to ensure that all commanders clearly

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[18] TC 19–16, at 9–5, discusses the CMT, to include the need for close liaison with the EOC. However, this TC uses what is (in the author's opinion) a faulty example when it suggests that the SJA is a staff section which may want to leave the key personnel at the office while a liaison representative sits on the CMT. The SJA and his attorney must be directly involved up front with the planning effort. This means that the SJA himself should be with the CMT at all times and his principal advisor in the EOC.

[19] Army Reg. 190–13, Military Police—The Army Physical Security Program, para. 1–5*q*(2)(d) (20 Jun. 1985) [hereinafter AR 190–13] requires installation commanders to develop an installation physical security plan. AR 525–13, para. 2–15*c* similarly requires installation commanders to develop plans to respond to a terrorist incident. There is no standard Army title for a terrorism counteraction plan. Another common Army title for such a plan (besides CCMP) is Special Threats Counteraction Plan.

[20] On most Army installations, military and/or DOD police only perform duty at major access gates or on roving patrols. Many of the sensitive interior guardposts and some remote access gates are manned by unit personnel with no professional police training. What instructions they receive, to include the use of deadly force, will usually come only from the relevant portions of the installation security plan.

[21] AR 5–3, para. 4–14*d*(13).

[22] AR 525–13, para. 4–3 and FORSCOM/TRADOC Supp. 1 to AR 190–52, para. 1–7 contain reporting procedures required by these headquarters.

[23] The value of enabling the EOC and CMT to view the incident scene in real time cannot be overemphasized. The installation Training and Audiovisual Support Center (TASC) may have all the camera and photographer assets needed to set up a twenty-four hour monitoring system. *See also* TC 19–16, at 10–11.

understand when and how their troops may use force, especially deadly force. Federal courts now balance the governmental interest in law enforcement or security against the reasonableness of the use of force. In 1985, for example, the Supreme Court held that the use of deadly force by police to "apprehend" an unarmed felon violated the victim's Fourth Amendment right against unreasonable seizure despite a state statute and common law rule permitting such use.[24]

This article uses the terms rules of engagement (ROE) and use of force instructions to define two separate categories of force instructions. Each of these categories determine how and when force may be used, but each category also serves a different purpose and should not be confused.

Rules of engagement—The limitations an installation commander (or his higher headquarters) may wish to put on the SRT or on the TMF during the actual CT operation are referred to in this article as rules of engagement (ROE). The term ROE, traditionally applied only to combat operational planning, is popular with military planners and has recently been used in Army terrorism publications.[25] ROE cannot be fully preplanned. ROE, as used in this article, are the controlling force instructions once the CCMP is implemented. Generic ROE can be written into the CCMP, but they must eventually be tailored to the individual situation. Most of all, ROE should be as simple as possible. Normally, this is not difficult, because a CT operation will usually be directed against a fixed target (*e.g.*, a group of terrorists with or without hostages). There will be little time for detailed planning and consultation with higher headquarters. Because armed terrorists are a threat to life, deadly force may be used against them. The ROE may also express a commander's desire to control the types of weapons used (including riot control agents) or to take other restrictive measures designed to enhance the ability of hostages to survive an assault.

Use of force instructions—These are the rules that determine when and how installation guards and law enforcement personnel may use force to defend themselves and perform their mission. Use of force instructions apply to all operations under the general installation security plan but not those performed by the TMF operating under the CCMP. Preparing use of force instructions is a more complex task than preparing ROE, which can be tailored to a known situation. Use of force instructions necessarily direct the law enforcement and security personnel how to react to a range of possible incidents. The kind and degree of force needed to evict a peaceful protester from the main gate, apprehend a thief stealing food from a commissary warehouse, or defend an ammunition supply point (ASP) against an assault by heavily armed terrorists are different in each case. The staff planner's careful preparation of these instructions will partially ease the great burden placed on the young guard or MP who must use force to perform his duty.

Although there are several Army documents that discuss the use of force on and off the installation, the SJA must be aware that not all of these references are applicable to the more likely on-post terrorist scenario.[26] The DA Civil Disturbance Plan (GARDEN PLOT), for example, has a very detailed section on the use of force. Although one DOD document has defined terrorism as a form of civil disturbance, a terrorist incident on a military installation will not automatically trigger this plan.[27] Other documents, such as FC 100–37–1, *Unit Terrorism Counteraction,* which include examples of force instructions, should not be adopted wholesale without ensuring that those instructions also meet the requirements of DOD Directive 5210.56 and AR 190–28, *Use of Force by Personnel Engaged in Law Enforcement and Security Duties.*[28]

Although DOD Directive 5210.56 and AR 190–28 provide guidance on the use of force, these documents must be interpreted and defined more specifically for the ordinary guard or policeman. Both the directive and regulation, for example, differentiate between property "vital" and "substantially important" to national security and between protecting against "threatened" and "actual" theft, damage, or espionage. Use of force instructions can be tailored to the installation's security needs. The instructions must be written (usually as an annex to the installation security plan) and explain exactly how and where on an installation security forces may use deadly force to protect property in accordance with DOD and DA guidance. Instructions written in the security plan annex should be supplemented with specific guardpost instructions that convey in simple and direct terms the rules applicable to that post.[29]

Issue 8—*Can the military police use riot control agents (RCAs)?*

Ever since the Vietnam War and President Ford's Executive Order No. 11850 in 1975, judge advocates have been

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[24] Tennessee v. Garner, 471 U.S. 1 (1985). The SJA should be particularly sensitive to older use of force instructions that allow the use of deadly force to stop the commission of a "felony" or to apprehend a fleeing "felon." This is no longer the rule. For a good discussion of the prior law relating to the use of force by the military in civil disturbance operations, see Murray, *Civil Disturbance, Justifiable Homicide and Military Law,* 54 Mil. L. Rev. 129 (1971).

[25] Dep't of Army, Field Circular 100–37–1, Unit Terrorism Counteraction, Appendix L (15 Nov. 1985) [hereinafter FC 100–37–1] uses the term ROE. Joint Chiefs of Staff Publication 1, Department of Defense Dictionary of Military and Associated Terms, 317 (1 June 1987) gives the traditional definition of ROE.

[26] *See, e.g.*, Dep't of Army Pam. 27–21, Military Administrative Law, para. 3–11 (1 Oct. 1985); Dep't of Army Field Manual 19–15, Civil Disturbances, chapters 7 and 11 (25 Nov. 1985) [hereinafter FM 19–15]; Appendix 10 (Special Instructions) to Annex C (Concept of Operations) to Dep't of Army Civil Disturbance Plan (1984) and FC 100–37–1, Appendix L. Note that this last appendix uses the term "rules of engagement" to refer to what this article calls "use of force instructions."

[27] DOD Dir. 3025.12 uses such a definition. *See also* FM 19–15, page 3–1 and Army Reg. 500–50, Emergency Employment of Army and Other Resources—Civil Disturbances, Chapter 2 (21 Apr. 1972) for guidance on the employment of forces off the installation for civil disturbances.

[28] Dep't of Defense Directive 5210.56, Use of Force by Personnel Engaged in Law Enforcement and Security Duties (6 May 1969) (C3, 16 Jan. 1987) [hereinafter DOD Dir. 5210.56]; Army Reg. 190–28, Military Police—Use of Force by Personnel Engaged in Law Enforcement and Security Duties (1 Aug. 1980) [hereinafter AR 190–28].

[29] An example of specific guardpost instructions might be to direct that the guard at the commissary warehouse only carry a baton and instruct that guard that he is not to use deadly force except in self-defense when in imminent danger of death or serious injury. Guards at the ASP, on the other hand, would carry M–16s with live ammunition carried in their magazines and be instructed specifically under what circumstances they may use deadly force to protect both the ammunition stored there and themselves.

aware of the sometimes severe limitations our national policy imposes on our use of RCAs in wartime.[30] A military commander must have both an acceptable reason for employment and the proper release authority to use a RCA. The use of such an agent on a military installation in the United States in peacetime, however, is not controlled to the same extent. Both control of civil disturbances and installation security are recognized reasons for employment of RCAs. Military police may also use chemical aerosol irritant projectors, such as the M36 dispenser, for law enforcement functions on a military installation in the United States.[31]

Although employment policies may allow the use of RCAs, and the former Army terrorism regulation, AR 190–52, actually advocated an assault strategy that utilized smoke, CS, and concussion grenades, the authority to employ RCAs in a particular CT operation should be sought from higher headquarters.[32] This should be easy, as the EOC will be in continuous contact with the Army and MACOM operation centers.[33]

Issue 9—*Are there limitations on the utilization of state and local law enforcement officials on the installation?*

The installation Provost Marshal (PM) maintains contact with both state and local community police forces. The PM may desire their assistance and even have contingency plans to that effect. The state and local authorities might augment the TMF, or, more likely, they would handle traffic problems associated with closing the installation or assist in patrolling roads along the installation perimeter.[34] Although there is no specific DOD or DA policy on using state and local police during a terrorist incident on a military installation, there are significant legal issues involved. The SJA should carefully review any plans to utilize nonfederal personnel in any law enforcement capacity, while considering the type of jurisdiction controlling the installation (*i.e.*, exclusive, concurrent, or proprietary) and whether the state and local police will be present purely at the military's request, or are protecting their own state interests.[35] Potential legal problems will arise in three general areas:

—First, if the state or local authorities desire to pursue their own course of action against the terrorists on an installation where they have jurisdictional authority to do so (*i.e.*, concurrent or proprietary jurisdiction), may the commander exclude them?

—Second, if the commander desires state or local assistance on the installation, will these officials have authority to perform law enforcement functions?

—Finally, are there potential tort liability problems for the federal government?

Excluding local police—The installation commander may exclude nonfederal law enforcement authorities from a military installation whether or not those officials have the legal authority to enforce state and local laws there. This power derives from federal supremacy and the inherent right of the federal government and military commander to maintain law and order on the installation. The Supreme Court stated, in *Cafeteria and Restaurant Workers v. McElroy*, that controlling access to a military base "is clearly within the constitutional powers granted to both Congress and the President."[36] Although it is highly improbable that a "turf war" would develop over a terrorist incident, the possibility will decrease substantially if the command regularly briefs state and local officials and gives them the opportunity to voice their concerns about the effects of any CT operation on their legitimate interests.

Utilizing local police—Several potentially serious problems may arise if the commander decides to utilize the state and local authorities on the installation. The first problem is whether the police will retain their law enforcement authority. The answer depends on the type of jurisdiction controlling the installation. If the police operate on an installation or a portion of an installation that is under concurrent or proprietary jurisdiction, state and local law enforcement officials retain their full authority to enforce state laws and arrest violators. If there is only exclusive federal jurisdiction, however, then under the federal enclave theory, the state and local police would be

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[30] Exec. Order No. 11850, 3 C.F.R. 980 (1971–1975) *reprinted in* 1975 U.S. Code Cong. & Admin News 2564.

[31] More detailed DOD guidance will be found in the Joint Strategic Capabilities Plan (JSCP). Army judge advocates not located at unified commands will not have a JSCP and should consult the Army Mobilization and Operations Planning System (AMOPS), Vol. IV, which the Plans and Operations Division of DPTM will have in its security container. Portions of both of these documents are classified. Chapter 9 of FM 19–15 contains a good description of the RCAs and dispensers that may be available to the military police at the installation level.

[32] Army Reg. 190–52, Military Police—Countering Terrorism and Other Major Disruptions on Military Installations, para. 2–2k(10)(b) (15 Jul. 1983). AR 525–13 has superseded this regulation.

[33] FORSCOM/TRADOC Supp. 1 to AR 190–52 requires that installations establish immediate telephonic communication with the applicable MACOM operation center [after telephonic notification is made with the Army Operations Center] in the event of a terrorist incident. *See* page 1–3, para. 1–7.

[34] TC 19–16, at 4–5, for example, recommends active liaison with local police and planning for their possible use for perimeter patrols *outside* the installation.

[35] Although AR 525–13 does not address the utilization of nonfederal law enforcement personnel, installation commanders are required to identify in contingency plans, areas of differing jurisdictional responsibility. *See* para. 2–15c.

[36] 367 U.S. 886, 890 (1961). Although *Cafeteria Workers* dealt with a Navy installation on federal land with exclusive federal jurisdiction, the Court's rationale was not based on either federal ownership or jurisdiction but on the constitutional powers granted Congress and the President to control and maintain military forces. Congress and the President have, in turn, enacted legislation and regulations which give commanders responsibility for ensuring the security of their commands. Recent opinions by The Judge Advocate General of the Army (TJAG), while not dealing specifically with the ability to exclude state and local officials, stressed that the installation commander has the inherent authority and responsibility to protect federal lives and property regardless of the legislative jurisdiction of the installation. *See, e.g.*, DAJA–AL 1986/3040, 17 Oct. 1986.

without power to act, except to the extent authorized civilians under citizen arrest laws.[37]

The PM may propose that the federal authorities "deputize" the state and local police to act as federal "agents." Although theoretically feasible, there are substantial bureaucratic problems with this solution. Most significantly, in a recent administrative law opinion concerning the employment of municipal police on Fort Douglas, Utah, The Judge Advocate General of the Army has advised that the Department of Justice will no longer make agreements deputizing state and local police as agents of the federal government.[38]

Liability—Behind the authority issue, of course, lurks the specter of federal tort liability. Tortious acts committed by state and local officials while assisting the military could result in federal tort claims. This would be especially true on installations under exclusive federal jurisdiction, where the federal government could not argue that the state and local officials were only acting as state agents protecting their own interests. This article will not attempt to discuss under what circumstances local police would be employees of the government within the meaning of the Federal Tort Claims Act[39] except to point out that the SJA should consider the liability issue when examining the employment plans. The SJA should seek to have state and local police perform functions that both further state interests and do not require federal control beyond that necessary for interagency police coordination.

Finally, state and local police forces often realize their potential liability and may request that the Army agree to indemnify them in return for their assistance. The SJA should be aware that the installation commander cannot make an agreement with state or local authorities to indemnify or insure police officers.[40] If there is any doubt about a proposed agreement of any sort with local officials, the SJA should seek guidance from the appropriate MACOM SJA before letting the commander commit himself.[41]

Issue 10—*May the commander utilize Army Reserve (USAR), National Guard (ARNG), or other service personnel?*

There are quite a few Army installations and facilities unprotected by either military police or active duty troops of any kind. Many of these are subinstallations miles away from the parent Army installation that supports them. A smart military planner may also realize that some of these installations are regularly occupied throughout the year by reservists and guardsmen performing weekend or two-week annual training, or they may be located near larger Air Force, Navy, Marine Corps, or other DOD facilities.

USAR/ARNG—In developing a terrorist response plan utilizing USAR or ARNG forces, the SJA should make certain that the commander realizes the following:

—National Guard soldiers training in the United States train under Title 32 of the United States Code, which does not subject them to direct federal control or the federal Uniform Code of Military Justice (UCMJ).[42]

—Army Reserve (or National Guard) soldiers serving under Title 10 of the United States Code (which subjects them to the federal UCMJ) train under self-executing orders (*i.e.*, orders that by their own terms automatically terminate the individual's active duty on a specified date without further action by the Army).[43]

—The Federal Tort Claims Act considers National Guard soldiers training unde Title 32 to be "employees of the government" for the purposes of liability.[44]

None of the above prohibit a commander from using Reserve Component forces when necessary, but they point out some limitations that may surprise the unaware active duty commander. Any plans calling for the use of the ARNG, of course, must be closely coordinated with the respective state Adjutant General. This may be easier in theory than in practice because some larger subinstallations may host guardsmen from many different states in a given year.

Interservice Support—The commander may negotiate an interservice support agreement (ISA) with another DOD activity to provide security force protection for an Army installation. This may be done regardless of the jurisdictional status (*i.e.*, exclusive, concurrent, proprietary jurisdiction) of the installation to be protected, because the federal forces would be protecting government lives and property, which is a function independent of jurisdiction.[45]

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[37] *See* DAJA-AL 1976/4154, 24 Mar. 1976; DAJA-AL 1981/3267, 24 June 1981 and DAJA-AL 1983/1468, 8 Apr. 1983, *as digested in* The Army Lawyer, Feb. 1984, at 47; all of which agree that state and local police officials have no law enforcement authority to protect federal property under exclusive federal jurisdiction. When there was a request to allow the North Little Rock, Arkansas police to perform security checks and law enforcement duties at the U.S. Army Reserve Center in that city, the FORSCOM SJA suggested that the federal enclave theory may be in retreat, citing *Howard v. Commissioners of the Sinking Fund of The City of Louisville*, 344 U.S. 624 (1953) and *Evans v. Cornman*, 398 U.S. 419 (1970). Because this line of cases involved the exercise of civil functions of government (taxation and voting) and not criminal jurisdiction, TJAG rejected this argument. *See* DAJA-AL 1981/3267, 24 June 1981.

[38] DAJA-AL 1976/4154, 24 Mar. 1976 suggests the possibility of deputizing local law enforcement authorities to assist at Military Traffic Management Command facilities. However, later TJAG opinions concerning the North Little Rock Reserve Center and Fort Douglas, Utah, discourage deputizing nonfederal police officers. *See* DAJA-AL 1981/3267, 24 June 1981 (U.S. Marshal's service "deputization" program) and DAJA-AL 1983/1468, 8 Apr. 1983, *as digested in* the Army Lawyer, Feb. 1984, at 47 (DOJ policy against deputizing state and local police).

[39] Employees of the government are defined at 28 U.S.C. § 2671 (1982).

[40] DAJA-AL 1983/1468, 8 Apr. 1983, *as digested in* The Army Lawyer, Feb. 1984, at 47.

[41] The MACOM SJA will normally gather the appropriate facts and coordinate with the Administrative Law Division, OTJAG, for approval.

[42] Army Reg. 135-200, Army National Guard and Army Reserve—Active Duty for Training, Annual Training and Full-Time Training Duty of Individual Members, para. 1-6a(9) (1 Aug. 1985) [hereinafter AR 135-200]. This contrasts with overseas exercise training. Army Reg. 350-9, Training-Reserve Component Overseas Deployment Training with Active Component Commands, para. 3-1d (1 Sept. 1983) also provides that all reserve component soldiers will be ordered to duty under 10 U.S.C. § 672(b) and (d) when training overseas.

[43] AR 135-200, para. 8-1.

[44] 28 U.S.C. § 2671 (1982).

[45] DAJA-AL 1986/3040, 17 Oct. 1986.

All interservice agreements, of course, must conform with the DOD/DOJ/FBI terrorism MOU and with applicable DOD guidance.[46]

Issue 11—*May the installation commander restrict access to public highways traversing the installation during a terrorist incident?*

Department of the Army regulations require the implementation of specific measures on an installation based on the terrorist threat condition (THREATCON). If a commander does not implement a specific measure, the rationale for not doing so must be reported to the next higher headquarters.[47] Under the most severe THREATCON, DELTA, the commander must control all access to the installation, identify all personnel entering the installation, and "consult with local authorities" about closing public roads and facilities that are vulnerable to terrorist attack.[48] It is possible, however, that the commander will be unable to contact the local officials, or the officials, will not agree with the commander that the road closure is vital to the installation's security.

The commander has the legal authority to control access to the installation and restrict traffic from public roads on the installation for security purposes. This authority is inherent in the power of the commander to maintain law and order on the installation.[49] Moreover, the commander's authority to deny access is not dependent upon a proprietary interest or possession of legislative jurisdiction over the road. A recent administrative law opinion on this subject by The Judge Advocate General of the Army stated that when public highways were created as a result of easements granted by the federal government, military control of the highway was generally authorized by a provision in the agreement making the easement subject to rules and regulations of the local commander.[50] Although the commander may have the authority to act, the SJA should remember that both this opinion and AR 525–13 emphasize that there should be notification of, and consultation with, local authorities whenever possible.

Issue 12—*May the commander release prisoners, pay a ransom, or concede to other demands of terrorists?*

There is no DOD or DA prohibition on communicating with terrorists during an incident. TC 19–16 emphasizes the importance of opening communications quickly in order to gain intelligence and secure the time needed to thoroughly assess the situation.[51] There are, however, some limits the commander must recognize when conducting negotiations:

Who negotiates?—The Commander, U.S. Army Criminal Investigation Command (USACIDC) has the responsibility of providing trained hostage negotiators.[52] The installation commander must identify CID negotiators or their designated alternates in planning documents.[53]

What is negotiable? United States national policy prohibits the release of prisoners or payment of ransom in exchange for hostages.[54] Until recently superseded by AR 525–13, AR 190–52 gave additional guidance on hostage negotiations. In the latter regulation, DA prohibited giving either weapons or munitions to terrorists and discouraged exchanging hostages for police. Demands for minor concessions such as food, drink, personal comforts, and transportation could be negotiable trade-offs, provided that the advantages and disadvantages were weighed and something was gained in return (*e.g.*, release of wounded hostages, etc.).[55] Because of the extreme sensitivity of negotiating or failing to negotiate concessions with terrorists, however, the SJA should advise the commander to consult with higher authorities before granting any significant terrorist demands.

Issue 13—*What may the commander do about the press?*

Along with the PM and the SJA, a third key member of the CMT is the Public Affairs Officer (PAO). Media exposure is always a primary terrorist objective. Because of this, the commander will try to limit media exposure and access to the terrorists while the incident is in progress. Department of the Army policy is to:

—Identify and report terrorist incidents as criminal acts unworthy of public support.

—Protect information concerning possible reactions of the law enforcement agencies.

—Provide accurate and timely information to the news media to minimize speculation and dispel rumors.

—Prevent the terrorists from using Army assets to manipulate the media and achieve their goals of massive publicity.

—Prevent members of the media from interfering with or influencing the CT operation.

—Prevent information about the preparation and deployment of CT forces from being released.

—Ensure that all information originates from a single source to reduce the possibility of compromising key information or releasing conflicting or inconsistent information.[56]

The area in which legal problems will most likely arise is in the control of the multitude of press reporters who will descend on the installation. The PAO, in concert with the

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[46] Dep't of Defense Directive 4000.19, Interservice, Interdepartmental and Interagency Support (Ch. 1, Dec. 3, 1980).

[47] AR 525–13, para. C–1.

[48] *Id.* para. C–2*b*(4).

[49] Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

[50] DAJA–AL 1982/2479, 24 Aug. 1982, *as digested in* The Army Lawyer, Apr. 1983, at 21.

[51] TC 19–16, at 9–16.

[52] AR 525–13, para. 2–7d.

[53] *Id.* para. 3–4a.

[54] Public Report of the Vice-President's Task Force on Combatting Terrorism 7 (1986).

[55] AR 190–52, para. 2–2*j*. AR 525–13 gives no comparable guidance on negotiations.

[56] AR 525–13, para. E–2*b*(4).

rest of the installation staff, must have a plan that will keep the media from interfering with or influencing the CT operation. The commander must refuse to allow reporters access to any terrorists. He may also find it necessary at times to detain a journalist or delay a reporter's television transmission. Since each of these restraints creates potentially troublesome constitutional issues, the SJA should carefully review the public affairs (PA) plan. The SJA may also want to station an attorney at the press center either full or part time to advise the PAO on the implementation of press restraints.[57]

As a general rule, the installation commander can place reasonable limitations on the activities of reporters. AR 525–13 requires commanders and PAOs to develop a PA plan that:

—Places a PAO representative in the EOC.

—Establishes a location for the press center and identifies the resources needed to put it into operation.

—Controls media access to the scene of the incident.

—Establishes rules governing photography and interviews of personnel involved.

—Determines the frequency of press briefings.

—Determines responsibilities of the different agencies involved.

—Establishes procedures for the coordinated release of information.[58]

The constitutional issues involved in implementing the DA plan and restricting the activities of the press in general will not be discussed in this article. The SJA should instead refer to an excellent *Army Lawyer* article on this subject by CPT Porscher L. Taylor III.[59]

Issue 14—*Are there legal problems with monitoring and gathering information on terrorists during a CT operation?*

In its definition of counterterrorism, the Department of the Army includes "the gathering of information and threat analysis" in support of offensive measures taken to respond to a terrorist act.[60] The U.S. Army Intelligence and Security Command (USAINSCOM) is the lead Army agency with the responsibility to provide information on terrorist threats to personnel, facilities, and operations on Army installations.[61] Federal statutes, executive orders, national and departmental policies, and Army regulations, particularly AR 381–10, *U.S. Army Intelligence Activities*,[62] control all intelligence operations conducted by Army intelligence units. The Judge Advocate General of the Army requires that staff and command judge advocates "maintain close liaison with intelligence activities operating within their jurisdiction to ensure that intelligence personnel receive timely advice."[63] Although intelligence law issues do not arise often on the average installation, the SJA should be prepared to give advice and this will require that he maintain current intelligence law materials (such as those listed in Appendix C). In this regard, the most useful text is USAINSCOM Pamphlet 27–1, *The Intelligence Law Handbook*.[64]

Once terrorists have struck at an installation and there is a CT operation in planning, however, intelligence law issues will seldom arise because the military police and CID assets belonging to the TMF and SRT will monitor the incident site. This distinction is important because the intelligence statutes, directives, and regulations do not apply to law enforcement personnel performing a law enforcement mission. For example, if the commander wishes to intercept a telephone conversation between terrorists holding hostages and a support group off the installation, the military police or CID would utilize the procedures stated in AR 190–53, *Interception of Wire and Oral Communication for Law Enforcement Purposes* rather than Procedure 5 of AR 381–10.[65] As a further twist, if the President authorized the release of military forces to assist civil authorities in controlling a civil disturbance and the Department of the Army implemented its civil disturbance plan (GARDEN PLOT), the intelligence gathering provisions of that plan would control over AR 381–10.[66]

In the scenario described at the beginning of this article, terrorists have struck an Army installation, seized a building, and hold hostages. Once the military police have surrounded the incident location and immobilized the terrorists, the commander will want to do the following:

—Establish direct communication between the terrorists and the hostage negotiating team.

—Cut off any telephone communication between the terrorists and the outside world or intercept their conversations if communications cannot be immediately severed.

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[57] At the installation level, the press center may be some distance from the EOC. All information will be released at the press center. The PAO will remain the sole spokesman for the command until the FBI assumes responsibility. Thereafter, the PAO will assist that agency and release information concerning Army involvement in the incident. *Id.* para. 1–7*b*.

[58] *Id.* para. E–2*b*(1).

[59] Taylor, *The Installation Commander Versus an Aggressive News Media in an On-Post Terrorist Incident: Avoiding the Constitutional Collision*, The Army Lawyer, Aug. 1986, at 19.

[60] AR 525–13, glossary, section II.

[61] *Id.* para. 2–8c.

[62] *See, e.g.*, Foreign Intelligence Surveillance Act of 1978, 50 U.S.C.A. § 1801–11 (West Supp. 1987); Exec. Order No. 12333, 3 C.F.R. 200 (1981) *reprinted in* 1981 U.S. Code Cong. & Admin. News B 102; Dep't of Defense Directive 5240.1, Activities of DOD Intelligence Components that Affect U.S. Persons (Dec. 3, 1982); Army Reg. 381–10, Military Intelligence—U.S. Army Intelligence Activities (1 Aug. 1984) [hereinafter AR 381–10].

[63] Policy Letter 86–6, Office of The Judge Advocate General, U.S. Army, subject: Intelligence Law (26 Nov. 1985), *reprinted in* The Army Lawyer, Jan. 1986, at 3.

[64] U.S. Army Intelligence and Security Command, Pamphlet No. 27–1, Intelligence Law Handbook (31 Jan. 1986).

[65] Army Reg. 190–53, Military Police—Interception of Wire and Oral Communications for Law Enforcement Purposes (3 Nov. 1986) [hereinafter AR 190–53].

[66] AR 381–10, procedure 1A3.

—Record all conversations with the terrorists and all other calls coming into the EOC or TMF headquarters.

Technical, not legal problems will be the greatest obstacle to accomplishing the first two tasks. Should the commander wish to have the CID intercept conversations, however, the provisions of AR 190–53 must be met. This regulation outlines emergency procedures for obtaining permission from the Attorney General and bypassing the need to get a prior court corder.[67] Direct communication between the installation EOC and the MACOM and Army operations centers will expedite such a request. A federal statute defines the emergency situations for which the Attorney General will authorize nonconsensual intercepts. These include: Immediate danger of death or serious physical injury, or conspiratorial activities threatening the national security interest.[68]

The military police may monitor and record direct telephonic communications with the terrorists or outside parties without permission of higher authorities. AR 190–30, *Military Police Investigations*, allows the military police to "monitor and record communications to provide an uncontroverted record of emergency communications." The location, whether at the military police station, a command center such as the EOC, or in a field location, does not alter the authority to monitor and record.[69] In addition, AR 525–13 authorizes the installation commander to approve the monitoring and recording of hostage negotiations. Chapter 3 of AR 190–30 would govern such monitoring.[70]

Issue 15—*How should the installation train?*

AR 525–13 requires that installation commanders "test and evaluate" command and installation counterterrorism plans at least every twelve months.[71] Although this is a new requirement in Army regulations, counterterrorism exercises have been required in CONUS since 1984 by FORSCOM/TRADOC regulation.[72] TC 19–16 contains helpful information and planning guidance including possible incident scenarios.[73]

The SJA should be involved in planning, as well as participating in, installation counterterrorism exercises. Although the G3/DPTM will direct the exercise planning effort, the SJA has a duty to provide legal training for both TMF and CMT personnel.[74] The latter will be particularly hard to do outside of the context of an exercise because the CMT consists of staff principals, a group that would be difficult to gather for a formal class. In this regard, the G3/DPTM may need the SJA's support to get all staff principals to participate full time in the exercise. The tendency in many offices is to send an action officer over to represent the staff principal on the exercise. When a real incident occurs, the staff principal will then take over without any familiarity with the relevant plans, procedures, and legal issues.

By participating in the planning process as a member of the planning cell, the SFA or his representative can interject a number of legal problems into the play. These problems, contained in the exercise master scenario events list (MSEL), should not ordinarily be directed to the SJA, but should go to other staff sections or the TMF. The scenario events should test the ability of the players to identify a potential legal issue and coordinate with the SJA for an answer. The ultimate goal of all staff exercises is to develop good staff coordination and exchange of data.

One of the potentially controversial steps in planning a counterterrorism exercise is the extent of FBI participation. There may be a reluctance to invite the FBI to participate in the exercise because of concern that they will "take over," or that their participation would diminish the exercises' training value to the installation's military police. The SJA should insist that the FBI be brought in at an early stage of the planning. It is axiomatic that the Army must train the way it will fight. The FBI will play a critical role in any CT operation in the United States. The SJA should emphasize that the annual exercise is the most valuable opportunity the commander and his staff will have to work out detailed arrangements with the FBI and find out their capabilities and requirements.

Conclusion

The success of a CT operation will depend on how well the installation commanders and staff prepare their plans and train their personnel. The SJA must ensure that the plans and operations of the commander conform with United States law, national and departmental policies, and Army regulations. The SJA in the EOC will be under intense pressure from the commander, other staff, and from the national media coverage a terrorist incident will generate. The EOC is no place to begin to research legal issues. The SJA must have the basic issues identified and the legal materials collected ahead of time so that when the commander wants the answers now, the SJA will "get it right the first time."

Appendix

Counterterrorism Legal Materials

The following materials will fit into two or three large ring binders. Those marked with asterisks are most useful.

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[67] AR 190–53, para. 2–3.

[68] 18 U.S.C.A. § 2518(7)(a) (West Supp. 1987) also includes "conspiratorial activities characteristic of organized crime" but this would not likely involve a terrorist incident.

[69] Army Reg. 190–30, Military Police—Military Police Investigations, para. 3–21 (1 June 1978) (IO1, 17 Jan. 1988).

[70] AR 525–13, para. 3–4*b*.

[71] *Id.* para. 2–15*c*.

[72] FORSCOM/TRADOC Supp. 1 to AR 190–52.

[73] TC 19–16, Appendix F, contains terrorist incident scenarios.

[74] *Id.* at P–2.

MACOM and local supplements should, of course, be added for all applicable regulations.

General Policy

Public Report of the Vice President's Task Force on Combatting Terrorism (February, 1986) pp. 7–14.

DOD Directive No. 2000.12, Protection of DOD Personnel and Resources Against Terrorist Acts.

* AR 525–13, The Army Terrorism Counteraction Program.

DA Pam 27–21, Military Administrative Law.

Operational Policy

* MOU–DOD, DOJ, FBI, Use of Federal Military Force in Domestic Terrorist Incidents (Aug. 5, 1983).

TRADOC Pam 525–37, U.S. Army Operational Concept for Terrorism Counteraction.

FM 100–37—Terrorism Counteraction.

* TC 19–16—Countering Terrorism on U.S. Army Installations.

FC 100–37–1—Unit Terrorism Counteraction.

* Jackson, *Legal Aspects of Terrorism: An Overview*, The Army Lawyer, (Mar. 1985).

* Installation Counterterrorism Crisis Management Plan.

Incident Reporting

AR 190–40, Serious Incident Report.

FORSCOM/TRADOC Supp. 1 to AR 190–52, Countering Terrorism and Other Major Disruptions on Military Installations.

Security

* Installation Security and Closure Plan.

Installation Interior Guard Regulation.

AR 190–13, The Army Physical Security Program.

* AR 190–30, Military Police Investigations.

AR 210–10, Administration.

Use of Force

* DOD Directive No. 5210.56 Use of Force by Personnel Engaged in Law Enforcement and Security Duties.

* AR 190–28, Use of Force by Personnel Engaged in Law Enforcement and Security Duties.

[Use both of these documents in conjunction with each other since the DOD Directive contains a recent change.]

Use of Chemicals

Army Mobilization and Operations Planning System (AMOPS)—Reference copy held by DPTM at the local installation.

Intelligence Activities

* AR 190–53, Interception of Wire and Oral Communications for Law Enforcement Purposes.

* USAINSCOM Pam 27–1, Intelligence Law Handbook.

* AR 381–10, U.S. Army Intelligence Activities.

AR 381–13, Acquisition and Storage of Information Concerning Nonaffiliated Persons and Organizations.

Aid to Civilian Law Enforcement (not including materials on off post aid and civil disturbances).

MOU–DOD, DOJ, Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction (July 19, 1955).

AR 600–40, Apprehension, Restraint, and Release to Civil Authorities.

Press Activities

* Taylor, *The Installation Commander Versus an Aggressive News Media in an On-Post Terrorist Incident: Avoiding the Constitutional Collision*, The Army Lawyer (Aug. 1986).

Sentencing Reform: Toward a More Uniform, Less Uninformed System of Court-Martial Sentencing

*Major Russell W.G. Grove (USMC)**
Director of Law Center, Marine Corps Air Station, Yuma, Arizona

Introduction

Ordinance of Richard I, A.D. 1190

Richard, by the grace of God, King of England, Duke of Normandy and Aquitaine, and Earl of Anjou, to all his subjects about to proceed by sea to Jerusalem, greeting. Know ye, that we, with the common consent of fit and proper men, have made the ordannances underwritten. Whoever shall slay a man on ship-board, he shall be bound to the dead man and thrown into the sea. If he shall slay him on land he shall be bound to the dead man and buried in the earth. If anyone shall be convicted, by means of lawful witnesses, of having drawn out a knife with which to strike another, or shall strike another so as to draw blood, he shall lose his hand. If, also, he shall give a blow with his hand, without shedding blood, he shall be plunged in the sea three times. If any man shall utter disgraceful language or abuse, or shall curse his companion, he shall pay him an ounce of silver for every time he has so abused him. A robber who shall be convicted of theft shall

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> have his head cropped after the manner of a champion, and boiling pitch shall be poured thereon, and then the feathers of a cushion shall be shaken out upon him, so that he may be known, and at the first land at which the ship shall touch, he shall be set on shore. Witness myself, at Chinon.[1]

Richard's code of military justice provided for certainty of punishment, if not proportionality. By contrast, punitive articles of the Uniform Code of Military Justice[2] provide that the person who violates an article ". . . shall be punished as a court martial may direct."[3] Other than the maximum permissible punishments prescribed in Part IV of the Manual for Courts-Martial (MCM),[4] courts-martial have few legal standards to use in determining what punishment to impose for an offense or combination of offenses.[5] Court-martial panels, often lacking in judicial experience, expertise, normative guidance, and basic information about the accused[6] and his offense, must guess at a sentence based on their collective intuition.[7] When the accused elects sentencing by military judge, the sentence is generally better informed, but is still arbitrary.[8]

I do not suggest that every barracks thief should get the same sentence. There is no one "correct" sentence for a given offense, although there might be only one correct decision under the law on a motion, or even a verdict, given certain facts. In court-martial sentencing, however, discretion and individualized punishment are perhaps too highly exalted over uniformity, certainty, and predictability. Almost everyone with substantial court-martial experience will agree that in spite of the best efforts and intentions of the participants, some court-martial sentences are clearly disproportionate, irrational, unjust, and inexplicable. Although most court-martial sentences are reasonable, any judge advocate or convening authority with a few years of experience has a repertoire of favorite "laughers" to share at happy hour. Most often these are sentences awarded by members.[9]

That most court-martial sentences are appropriately decided is primarily attributable to the conscientiousness and good judgment of military judges and members, in spite of and not because of the sentencing procedures of the MCM. This article will consider alternative sentencing measures that would make the court-martial sentencing process less discretionary and more thorough and informed. Among these measures are a proposal to abandon sentencing by members and adopt a system of military judge sentencing with advice of members, a proposal to use presentencing reports in lieu of the current presentencing process, and a proposal to adopt a uniform set of sentencing guidelines.

Purposes and Objectives of Court-Martial Sentencing

The closest thing to a statement of sentencing policy in the MCM is in its preamble: "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and to thereby strengthen the national security of the United States."[10]

The four classical sentencing philosophies of retribution, general deterrence, specific deterrence, and rehabilitation are as applicable in the military as they are in civilian jurisdictions.[11] Sentencing should, of course, be individualized to the accused,[12] yet be proportionate to the offense and contribute to crime reduction.[13] Ideally, similar offenders who commit similar offenses should be sentenced in similar fashion.[14]

Good order and discipline require that sentences be consistent, just and swift.[15] Proceedings that minimally interfere with regular duties of trial participants are the most efficient and effective.[16]

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[1] 2 F. Grose, Military Antiquities Respecting a History of the English Army 62 (1812) (quoting the Ordinance of Richard I, A.D. 1190, decreed to prevent disorders between soldiers and sailors during the Crusades).

[2] Uniform Code of Military Justice arts. 81–134, 10 U.S.C. §§ 881–934 (1982) [hereinafter UCMJ.]

[3] Exceptions are UCMJ arts. 90, 94, 99, 100, 101, 102, 104, 106a, and 120 (death or such other punishment as a court martial may direct); UCMJ art. 106 (death); UCMJ art. 118(1) and 118(4) (death or imprisonment for life); and UCMJ art. 134 (punished at the discretion of the court).

[4] Manual for Courts-Martial, United States, 1984, Part IV [hereinafter MCM, 1984, Part IV].

[5] *See infra* text accompanying notes 10 and 26–37.

[6] For example, financial, family, and psychological data are often ignored in favor of cumulative evidence of work performance.

[7] *See infra* text accompanying notes 18–37.

[8] *Id.*

[9] *See generally* 1 Military Justice Act of 1983 Advisory Commission Report 90, 135, 348 [hereinafter Adv. Comm'n. Rept.] (Testimony of Major General (MG) Kenneth J. Hodson, USA, ret.; Colonel (Col) Donald B. Strickland, USAF; and Brigadier General (BG) Raymond W. Edwards, USMC, ret.).

[10] *See also* Manual for Courts Martial, United States, 1984, Rule for Courts-Martial 1002 [hereinafter R.C.M.] (Sentence to be between maximum and minimum); R.C.M. 1005e (required instructions).

[11] *See* Dep't of Army Pam. 27–9, Military Judges' Benchbook, para. 2–54 (1 May 1982) (protection of society, punishment, rehabilitation, preservation of good order and discipline, deterrence of the wrongdoer, and general deterrence); *see also* U.S. Sentencing Commission Annual Report 1 (1986) (just punishment, deterrence, incapacitation, and rehabilitation).

[12] United States v. Morrison, 41 C.M.R. 484 (A.C.M.R. 1969); United States v. Lania, 9 M.J. 100 (C.M.A. 1980).

[13] U.S. Sentencing Commission Annual Report 1 (1986).

[14] *Id.*

[15] *See* Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 Am. Cr. L. Rev. 5, 6–7 (1971).

[16] *Id.*

Flaws in Military Sentencing

Lack of quantity, quality, and uniformity of sentencing data.

The military presentence hearing is adversarial, highly discretionary, and further limited by evidentiary rules.[17] RCM 1001(b)(1) provides that in the presentence hearing the trial counsel shall inform the court of the pay and service of the accused and the duration and nature of any pretrial restraint.[18] These few lines from the top of the charge sheet, along with the charges and specifications of which the accused stands convicted, constitute the only required sentencing evidence.[19] Trial counsel may present personnel records, evidence of prior convictions, evidence in aggravation, and evidence of rehabilitation potential.[20] The defense then may present matters in extenuation and mitigation, including a statement by the accused.[21] Rebuttal and surrebuttal may follow.

While RCM 1001 allows for presentation of a substantial amount of sentencing information, counsel can elect not to present evidence. They might do so because the accused desires a punitive discharge;[22] for tactical reasons; because of a pretrial agreement with a very low sentence limitation; or out of inexperience, indolence, or lack of preparation. If the accused elects to make a statement, it is often unsworn and may consist only of a brief expression of remorse or a cursory personal history.

Lack of experience and expertise.

One of the primary criticisms of court-martial sentencing is that members, and some judges, lack the experience and knowledge necessary to be proficient in determining an appropriate sentence. This criticism has been aimed primarily at member sentencing.[23] Military judges are likely to be aware of trends in sentencing and concerned about sentence disparities. They are trained in the law and the philosophy of sentencing. With experience, they develop expertise that promotes uniformity.[24] Even a first-tour military judge will bring substantial court-martial experience to the bench.

Sentencing involves normative, correctional, and other judgments requiring more than merely legal expertise. Civilian judges, therefore, frequently rely upon the presentence report and expert advice of a court adjunct, usually a probation officer with special training and experience in criminal justice.[25] Military courts operate without a comparable sentencing expert.

Lack of guidelines.

Other than the maximum permissible punishments prescribed in Part IV of the MCM[26] and the Article 19 special court-martial sentence limits,[27] a court-martial has little legal guidance in making sentencing decisions. RCM 1003 lists authorized types of punishments without defining them or suggesting occasions for their use.[28] RCM 1003 also has "accelerator" or "habitual offender" rules[29] that may increase the maximum permissible punishment based on an accumulation of offenses or previous convictions. RCM 1001 enumerates the types of evidence the court may consider, but provides no guidance as to the relative weight or significance such evidence should carry.

Sentencing courts are charged to set aside predisposition[30] and to consider the entire range of punishment, from no punishment at all to the maximum authorized.[31] Consideration of specific aggravating factors is mandated only in capital cases.[32] In cases with members, the judge must instruct on certain sentencing factors,[33] such as the effect of

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[17] For example, Mil. R. Evid. 404b, which precludes some specific instances of conduct. *See also* R.C.M. 1001(b)(5) (testimony about accused's performance and rehabilitation potential limited to opinion; specific instances disallowed on direct examination). Hearsay and authenticity rules also apply, unless rules are relaxed at the insistence of the defense. *See* R.C.M. 1001(c)(3); *see also* United States v. Booker, 5 M.J. 238 (C.M.A. 1977) (limiting admissibility of evidence of prior nonjudicial punishment).

[18] R.C.M. 1001(b)(1).

[19] In guilty plea cases, the court may not ordinarily consider the plea inquiry as evidence. Mil. R. Evid. 410; United States v. Richardson, 6 M.J. 654 (N.M.C.M.R. 1978), *petition denied*, 6 M.J. 280 (1979); United States v. Brooks, 43 C.M.R. 817 (A.F.C.M.R. 1971). *But see* United States v. Holt, 22 M.J. 553 (A.C.M.R. 1986), *petition granted*, 23 M.J. 358 (C.M.A. 1987) (military judge consideration of plea inquiry not *per se* impermissible).

[20] *See generally* R.C.M. 1001(b)(2)–(5).

[21] R.C.M. 1001(c). Defense counsel who does not present evidence in extenuation and mitigation risks charges of ineffective assistance. *See, e.g.*, United States v. King, 13 M.J. 863, 866 (N.M.C.M.R. 1982), *petition denied*, 14 M.J. 205 (1982); United States v. Gagnon, 15 M.J. 1037, 1041 (N.M.C.M.R. 1983).

[22] Occasionally an accused who might not otherwise receive a punitive discharge will specifically request the court to impose a bad conduct discharge as part of the sentence. This trend was more prevalent in the 1970's. The typical "striker," as they are sometimes called, wants out of his service obligation for one reason or another, and may have already unsuccessfully sought administrative discharge. The charges in these cases are usually absence offenses or offenses against authority, the goal of the accused being to secure a discharge with minimal confinement and financial penalty.

[23] *See* Adv. Comm'n Rept., *supra* note 9, at 89–90 (Testimony of MG Kenneth J. Hodson, U.S.A., ret., former Judge Advocate General of the Army):

> I dealt with many convening authorities, and none have ever complained of the findings of a court, but many have been upset by the sentence . . . Incidentally, I have never had a convening authority complain about a sentence imposed by a judge . . . Sentences adjudged by court members are adjudged pretty much in ignorance, and they tend to vary widely for the same or similar offenses. They amount almost to sentencing by lottery.

[24] *Id.* at 5.

[25] *See* ABA Standards Relating to Sentencing Alternatives and Procedures 18–5.1 Commentary (1979); *see also* Model Sentencing and Corrections Act § 3–203 Comment (U.S. Dept. of Justice 1978) [hereinafter Model Act].

[26] *See supra* note 4.

[27] UCMJ art. 19.

[28] R.C.M. 1003(b)(3) discussion provides that a fine should normally not be adjudged unless the accused was unjustly enriched by his offense.

[29] R.C.M. 1003(d).

[30] *See* United States v. Karnes, 1 M.J. 92 (C.M.A. 1975); United States v. Cosgrove, 1 M.J. 199 (C.M.A. 1975).

[31] R.C.M. 1002; R.C.M. 1005.

[32] R.C.M. 1004.

[33] R.C.M. 1005.

a guilty plea[34] and pretrial confinement.[35] The judge may give tailored instructions on other extenuating, mitigating, or aggravating factors,[36] but many do not. Those who do risk error.[37]

Practically every other determination a court-martial makes—motions, challenges, objections, and even verdict—is guided by much more comprehensive legal standards than those employed in sentencing.

Harm Caused

Court-martial proceedings that appear desultory and arbitrary, diminish the respect that the military, civilian, and political communities have for military justice and the military leadership. This is especially so when an aberrationally disproportionate sentence gets widespread attention. In the military community this typically occurs when a convicted barracks thief or drug seller is neither confined nor discharged. Civilians, on the other hand, are more often shocked by cases like that of Air Force Second Lieutenant Joann Newak, whose sentence for drug offenses and homosexual sodomy included seven years of confinement.[38]

Certainly the greatest harm is that caused within the military community. Loss of faith in the justice system undermines overall respect for authority and the law. Inordinately oppressive punishments impair morale. Fortunately, convening and reviewing authorities can reduce clearly excessive sentences. Overly lenient sentences, on the other hand, subvert discipline and cannot be cured.[39] This situation can breed such evils as unlawful command influence and vigilante justice.[40] The legendary Third Armored Division cases[41] and the more recent case of *United States v. Levite*[42] illustrate the witness tampering and other improper conduct that often results from lack of command confidence in the court-martial sentencing process.

Possible Solutions

Military judge sentencing with advice of members.

Sentencing by members and by juries in civilian cases has long been criticized.[43] Sentencing is a judicial function under American Bar Association (ABA) Standards.[44] In 1968 and again in 1979, the ABA strongly recommended abolition of jury sentencing in all but capital cases.[45] One fear is that the lay panel is prone to resolve doubt as to guilt by compromising on a light sentence.[46] Another concern is that members/juries often fail to consider factors other than moral approbation—recidivist tendency, available programs and facilities,[47] and the practical effects of particular kinds of punishment. Jurors or members are more likely than judges to be concerned about what others might think of their sentence,[48] and therefore tend to be less independent in their judgment. The danger of unlawful command influence is obviously greater in member cases. Seasoned judges are better able than members to appropriately consider volatile information,[49] and so can safely be exposed to a more complete evidentiary picture. Judges tend to be less swayed than members by sentimentality, the oratory and personality of counsel,[50] and evidence of the accused's work performance.

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[34] R.C.M. 1001(f); *see also* United States v. McKleskey, 15 M.J. 565 (A.F.C.M.R. 1982).

[35] United States v. Davidson, 14 M.J. 81 (C.M.A. 1982).

[36] R.C.M. 1005(4).

[37] United States v. Below, ACM S26133 (A.F.C.M.R. 28 Oct. 1983) (sentence set aside where military judge instructed panel to consider accused's awards and decorations, but did not specifically mention other mitigating evidence, i.e., combat record); *see also* United States v. Watkins, 17 M.J. 783 (A.F.C.M.R. 1983); United States v. Gore, 14 M.J. 975 (A.C.M.R. 1982) (mendacity instructions).

[38] *See* McCarthy, *Justice for a Lieutenant*, Wash. Post, Jan. 9, 1983, at M.4; *see also* United States v. Newak, 15 M.J. 541 (A.F.C.M.R.), *rev'd*, 24 M.J. 238 (C.M.A. 1987). The drug offenses consisted of wrongfully using, possessing, and transferring marijuana and attempting to wrongfully possess and transfer pills she believed to be amphetamines. The convening authority reduced Lt. Newak's confinement to six years.

[39] The convening authority cannot increase the punishment. R.C.M. 1107(d).

[40] An example is the traditional "blanket party" in which indignant members of a unit administer a gang beating to one of their numbers who is accused of barracks theft or other reprehensible conduct on the supposition that the military justice system will not impose sufficiently severe punishment.

[41] *See generally* United States v. Thomas, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 107 S. Ct. 1289 (1987); United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984), *petition granted*, 20 M.J. 131 (1985).

[42] United States v. Levite, 25 M.J. 334 (C.M.A. 1987).

[43] *See supra* note 23; *see also* Jouras, *On Modernizing Missouri's Criminal Punishment Procedure*, 20 U. Kan. City L. Rev. 299, 302 (1952) (survey found that Missouri judges, parole board officials, and prosecutors considered judges less affected than juries by emotions and prejudices, that the judges' sentences were more uniform and commensurate to the offense and offender, that juries tended to compromise findings with sentence considerations, and that sentimentality and the "oratory and personality of an impressive counsel" play disproportionate roles in jury sentences); Adv. Comm'n Rept., *supra* note 9, at 347 (testimony of former Assistance Judge Advocate General of the Navy for Criminal Law, BG. Raymond W. Edwards, USMC, ret.):

> The time has come to give the sentencing to the military judge. This will give us more consistent and enlightened sentencing tailored to the accused and to the offense, taking into consideration the interests of society . . . This consistency in sentencing will assist the military justice system in maintaining the respect of military society.

[44] ABA Standards Relating to Sentencing Alternatives and Procedures 18–1.1 (1979) [hereinafter ABA Standards].

[45] Adv. Comm'n Rept., *supra* note 9, at 31.

[46] *Id.* at 31.

[47] *Id.*

[48] *Id.* at 6.

[49] *Id.* at 5.

[50] *See* Jouras, *supra* note 42, at 302. Other advantages to judge sentencing cited in the Advisory Commission report are (1) less potential for error; (2) shorter case processing times; (3) avoidance of forum shopping; and (4) members sentencing option tends to encourage military judges to adjudge lenient sentences to ensure that accused soldiers choose military judge alone trials.

Most civilian jurisdictions have abandoned jury sentencing in noncapital cases.[51] It does not necessarily follow, however, that the military jurisdiction should follow that trend. Court-martial panels are unique "blue ribbon" assemblies, in theory, specially selected for their experience, good judgment, and judicial temperament.[52] The standing panel appears to be a thing of the past, but even the most inexperienced panel consists of mature, specially screened people with professional status and experience and at least some basic training in military law and customs.[53]

Member participation in sentencing does have advantages. It helps define the military community norms for given offenses,[54] and provides feedback to the judges in that regard. Court-martial participation by members increases their understanding and respect for, our system of justice. The member sentencing option is considered to be an important right of the accused.[55] These reasons are among those adopted by the Military Justice Act of 1983 Advisory Commission in recommending rejection of a proposal to abolish member sentencing in noncapital cases.[56]

There are advantages to both judge and member sentencing. The UCMJ should be amended to provide for sentence imposition by the judge, with the advice of the panel if the accused so elects. This generally is the paradigm in states that retain jury involvement in sentencing.[57]

Such a system would preserve the advantages of member participation, yet allow the judge to act as a check against patently disproportionate or arbitrary sentences. The judge's discretion would in turn be checked by the suasion of the members' recommendation. An additional advantage would be the judge's ability to rectify technical errors[58] in the members' sentence on the spot, rather than require the members to redeliberate or refer the matter to the convening authority for correction.[59]

Present deliberation procedures could be continued, but the members' sentence under this system would be in the form of a recommendation. Individual dissenting members would be allowed to make their own separate recommendations in addition to the one concurred in by the panel,[60] so the judge will have the benefit of that additional feedback in making his decision.

To ensure that member participation is truly meaningful, the judge in this model should be compelled under the UCMJ or the MCM to accord deference to the members' judgment, and to adopt the panel's proposed sentence unless it is contrary to law, clearly disproportionate, or clearly inimical to good order and discipline. These would be the only bases for a variation from the proposed sentence. Clearly, a judge should have authority to correct a sentence that would be contrary to law. The latter two grounds provide authority for a military judge to correct a proposed sentence that, while legal, is manifestly inappropriate to the accused and the crime. A sentence would be "disproportionate" or "inimical to good order and discipline" only where it varied substantively from the range of sentences normally imposed for similar offenses. A substantial variation would include variation in award of punitive discharge, forfeitures instead of fine, form of restraint, months of confinement, months of forfeiture, and reduction in grade. It would not include variation of a few days restraint or a few dollars of forfeiture. Perfect uniformity is neither a desirable nor an attainable objective, but providing the military judge the option of overriding a clear abuse of discretion by the panel would reduce the incidence of "the ridiculously low sentences and the ridiculously high sentences."[61]

Judges should not be encouraged to override panel recommendations at a whim, but they should have the option of overriding the panel in the face of a manifestly bad sentence. In the event the judge imposes a sentence that varies from the panel's recommendation, the judge should be required to enter specific findings establishing a rationale for the variations. The convening authority and courts of military review would be still authorized to disapprove excessive sentences or parts thereof.[62] Chief judges and circuit military judges would continue to monitor sentences and make appropriate inquiries if certain judges fail to follow the law, regularly override the members, or abuse their discretion.

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[51] Adv. Comm'n Rept., *supra* note 9, at 5. Six states retain jury participation in noncapital sentencing. Sixteen states and the District of Columbia have it in capital cases only. In almost all of those, jury sentencing is limited to those cases in which guilt is determined by the jury and the judge retains the power to set aside the jury sentence. Gilbreath, *The Constitutionality of Harsher Sentences on Retrial in Virginia,* 62 Va. L. Rev. 1337, 1339 (1976). The Gilbreath article was written before Tennessee abolished jury sentencing in 1982. *See* National Institute of Justice, Sentencing Reform in the United States; History, Content, and Effect 243 (1985) [hereinafter N.I.J.].

[52] UCMJ art. 125. In reality, members are often picked according to their availability and dispensability.

[53] Unless an enlisted accused requests that the panel include enlisted members, the panel will ordinarily consist entirely of commissioned officers, almost all of whom are college graduates. Many warrant officers and senior enlisted members also have some college level education.

[54] Adv. Comm'n Rep., *supra* note 9, at 5.

[55] *Id.*

[56] *Id.* The Commission also cited the likelihood of increased sentences to confinement and a concomitant increase in corrections costs if member sentencing was abolished. Even so, that is probably a poor reason to continue sentencing by members. If more sentences including confinement are appropriate, then more should be given. The Commission also found "no persuasive evidence that judge sentencing produces more consistent sentences than court member sentencing for similarly situated accuseds." This question suggests that the Commission did not find the implication of the testimony of a former Army TJAG (MG Hodson), a former Navy ATJAG (BG Edwards), and an Air Force Chief Justice (COL Strickland) to be persuasive. *See supra,* notes 9, 23, and 42.

[57] Gilbreath, *supra* note 43, at 1339.

[58] Examples of such technical errors include exceeding jurisdictional forfeiture limits, failing to round forfeitures to whole dollars, awarding restriction without specifying restriction limits, awarding administrative discharges, and awarding nonjudicial punishment, such as correctional custody or extra duties.

[59] *See* R.C.M. 1009(c)(2)(B).

[60] Member sentences now require concurrence of two-thirds of the members, except for sentences including confinement for life or more than ten years (three-fourths concurrence) or death (unanimous concurrence). R.C.M. 1006(d)(4).

[61] *See* Adv. Comm'n Rept. *supra* note 9, at 135 (Quote from testimony of Col. Donald B. Strickland, USAF, then Chief Judge, USAF Trial Judiciary.

[62] UCMJ arts. 60(c), 66(c).

Some court members may resent the adoption of the proposed system. Senior ranking officers might feel slighted and believe that they are being second guessed by a military judge. In reality however, panel sentences are already subject to downward adjustment by the convening authority and respective court of military review. Furthermore, hurt feelings are neither as grave nor as permanent as the inappropriate sentences that may result under the present system. Finally, this potential problem can be alleviated by providing for detailed and diplomatic instructions to the panel regarding its sentencing role, and by detailing members with requisite judicial temperament.[63] When the judge's sentence does vary from the panel recommendation, explanation by way of careful, objectively formulated essential findings would also help to minimize hard feelings.[64]

Use of presentence officer recommendations.

In military practice, counsel must marshal the evidence and make recommendations with respect to the sentence.[65] Presentence proceedings are only slightly less adversarial and formal than proceedings prior to findings.[66] In such an adversarial process, a just outcome is dependent upon relatively equal effort, knowledge, and ability of counsel for both sides.

A well-tried sentencing case can be very time-consuming and expensive. It might include aggravation testimony of victims and law enforcement agents; testimony of the accused's parents, teachers, commanders, and work supervisors; a stack of military personnel records; testimony of psychologists, counselors, medical personnel, and other professional experts; and laborious argument by counsel, summarizing evidence and expounding on sentencing philosophy. For various reasons, however, counsel often elect to present a very brief, "bare-bones" case, giving the court very little with which to work.[67] The court may request additional evidence, but rarely does, supposing—perhaps erroneously—that counsel have good reasons for not presenting more.

The typical civilian criminal court achieves more thorough, expert, consistent, and economical sentencing by the use of presentence reports and recommendations of probation officers or presentence officers.[68] This officer will ideally have training and experience in law enforcement, criminology, corrections, sociology, psychology, and other related disciplines.[69] The report and recommendation are the result of an investigation of the offense and of the background and character of the defendant.

Exact imitation of the civilian model is neither feasible[70] nor desirable. The cost and time consumption involved are salient drawbacks. It is feasible, however, to use military personnel as presentence officers in appropriate cases, and to construct a presentence report format tailored to military sentence considerations, while maintaining or increasing speed and economy of trials. Military corrections specialists would be ideally suited to this purpose.[71] Judge advocates, senior noncommissioned officers with military justice experience, or other experienced military personnel could be specially trained and used in this role. The advantage of using the correctional specialist is that the specialist's expertise would obviate the need for extensive and costly training.[72]

A presentence officer with such training and experience would have a more informed perspective of military offenders, their crimes, and of the range of sentence normally imposed for particular offenses. The officer would have a better understanding of the factors that are pertinent in selecting punishments, predicting rehabilitation, and correcting behavior, and would have a greater knowledge of the practical consequences of the various kinds of available punishment.

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[63] As presently required by UCMJ art. 25(d)(2).

[64] The military judge should have the option of dismissing the panel and deliberating before announcing sentence and, if required, essential findings.

[65] *See generally* R.C.M. 1001.

[66] The Military Rules of Evidence generally apply to sentencing proceedings. Testimony of witnesses is under oath and subject to cross examination and objection. Rebuttal and surrebuttal cases may be presented, and counsel for both sides have the opportunity to make argument to the court. *But see* R.C.M. 1001(c)(2) (accused may make an unsworn statement) and R.C.M. 1001(c)(3) (military judge may relax rules of evidence in extenuation and mitigation).

[67] Sometimes counsel simply miss the mark, spending much time and effort but presenting little significant material. Inexperienced counsel especially tend to be less effective in their presentence advocacy than in litigating motions and findings, in part because presentencing is neither taught in law schools nor emphasized in military legal training.

[68] *See* Model Act, *supra* note 25, § 3-201; *see also* Fed. R. Crim. P. 32; Administrative Office of the U.S. Courts, Probation Division, The Presentence Investigation Report (1984) [hereinafter Presentence Inv. Rept.].

[69] C. Dressler, *Practice and Theory of Probation and Parole,* 219-37 (1979).

[70] R.C.M. 1001 analysis at A21.

[71] Marine Corps: MOS 5804, corrections office; MOS 5831, enlisted corrections specialist; MOS 5832, enlisted correctional counselor. Marine Corps Order P1200.7f, Military Occupational Specialties Manual (8 July 1986). Army: AOC 31C, corrections officer. Army Reg. 611-101, Commissioned Officer Classification System para. 3-8e (30 Oct. 1985). MOS 95c, corrections noncommissioned officer. Army Reg. 611-201, Enlisted Career Management Fields and Military Occupational Specialties, para. 2-389 (31 Oct. 1987). Navy: Designator 6110, deck limited duty officer. Bureau of Naval Personnel Manual 15839, Navy Officer Manpower and Personnel Classification (14 Mar. 1986). NEC 9548, enlisted correctional specialist; NEC 9816, enlisted correctional counselor. Bureau of Naval Personnel Manual 18068e, Navy Enlisted Manpower and Personnel Classification and Occupational Standards (Oct. 1987). Air Force: AFSC 8124, Security Police Officer, Air Force Reg. 36-1, Officer Classification Manual (1 Jan. 1984). AFSC 812 XO, enlisted security policeman, Air Force Reg. 39-1, Airman Classification Manual (1 Jan. 1982).

[72] Army, Navy, and Marine Corps corrections officers, correctional specialists, and correctional counselors receive approximately five weeks of training at the Fort McClellan, Alabama, Corrections Officer and Correctional Specialist Schools. Enlisted military police in grades E-4 and above are eligible for the Correctional Specialist Course; E-5s and above are eligible for the Correctional Counselor Course. In addition to subcourses relating to prison administration and security, the curriculum includes penology, custody classification, counselling, correctional report writing, sentence computation, educational programs, work programs, pre-release programs, internship, situation management, and interpersonal relations. Part of the training is in conjunction with Federal Bureau of Prisons training at Taladega Federal Prison. Graduates of these courses are qualified to write federal presentence reports. Telephone interview with Sr. Chief Douglas R. Malston, USN, Operations Officer, Naval Brig, Pensacola, Florida, formerly a corrections instructor at Ft. McClellan (29 Feb. 1988).

To ensure independence of judgment and avoid the appearance of impropriety, such presentence officers should be organized independently of the existing military law enforcement structure and performance evaluation scheme. The best alternative may be to use the existing trial judiciary structure and the senior circuit judge as the rater. Presentence officers could be collocated with military judges, with common administrative and logistical support and common jurisdictional responsibility.

A presentence report similar to those used in U.S. District Court,[73] with data and recommendations scaled down and adapted to military practice, would be much more comprehensive and valuable than what military courts now use.

Such a report should include detailed information about the offense or offenses for which sentence is to be imposed. This would include a prosecution version; defense version;[74] statement of financial, physical, and psychological impact on any victim;[75] codefendant information, including relative culpability; and statement summaries of witnesses and complainants.[76]

The report should feature personal and family data. The accused's early life influences, home and neighborhood environment, and family cohesiveness should be included.[77] The accused's criminal and disciplinary history is a very significant component, and available information relating to juvenile delinquency, truancy, and running away from home should also be noted. Accomplishments, special talents and interests, and significance of religion in the accused's life are also pertinent.[78] The report might include family history regarding criminality, emotional disorders, employment, health, citizenship, religion, and attitudes of parents and siblings toward the accused and toward his offense.[79]

Marital information should definitely be included. A spouse or cohabitation partner is normally a dominant influence on the accused, as well as a valuable source of information.[80] Under present court-martial sentencing procedures, information regarding the spouse or companion and the quality of the relationship is usually minimal. If a spouse or fiancee has an impressive personality, defense counsel might ask him or her to appear at the presentence hearing. A competent defense counsel, however, will try to ensure that the court never sees or learns about a spouse or cohabitation partner that is a negative influence. Marital data should include information on problems in the relationship, separations, divorces, and children.[81]

Education, special training, and employment history should be addressed.[82] Character and performance evaluations by former employers and military supervisors are always helpful in assessing rehabilitation potential, responsibility, attitude toward work, ambitions, interests, occupational skills,[83] responsiveness to orders, respect for superiors, and leadership potential. Summarizing these evaluations in a presentence report would be more efficient and concise than having the witnesses testify personally.

The accused's health, including physical illnesses and history of drug or alcohol abuse, should be included.[84] Intelligence test scores and other available psychological information should be included, as well as any psychiatric history and evaluations.[85]

The accused's financial conditions can be especially important, particularly in assessing forfeitures or a fine. This information should be part of the report. In current court-martial practice, counsel sometimes fail to present significant financial condition evidence.[86]

Whether these items of information are presented in courts-martial depends on such variables as time, effort and expertise of counsel, adherence to evidentiary rules, and counsel's tactical considerations. Submission of a standard presentence officer's report, in addition to the military judge's instructions, would be the most efficient means of assuring that the court is fully briefed before making its sentence decision.

Trial counsel could conceivably be tasked with preparing and presenting such reports. The prosecutor, however, is not neutral, and will lack the objectivity, motivation, expertise, and time needed to prepare the report.

The advantages of using presentence officers and reports are as follows:

a. Sentencing data would be gathered and presented in a more uniform, thorough, concise, and objective manner. The sentence officer's primary duty would be to methodically assemble and interpret sentence information. Unlike counsel, he would be objective, desiring neither a light sentence nor a heavy sentence, but an appropriate and informed sentence, reached methodically and dispassionately. Unlike the military judge and members, the presentence officer would be free to gather evidence independently. Of

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[73] Presentence Inv. Rept., *supra* note 68, at 54–60. For further discussion of recommended presentence report content and format, see ABA Standards 18–5.1 and commentary, *supra* note 44.

[74] Subject to waiver of rights under U.S. CONST. amend. V and UCMJ art. 31.

[75] Presentence Inv. Rept., *supra* note 68, at 3.

[76] *Id.* at 6.

[77] *Id.* at 12.

[78] *Id.*

[79] *Id.* at 13.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 14.

[83] *Id.*

[84] *Id.* at 15.

[85] *Id.*

[86] E.g., where the offense is motivated by poverty or indebtedness, or where an apparently prosperous individual steals or sells drugs for profit.

all the court personnel, the presentence officer would have the best idea of what information is required, and how to gather and use it most efficiently.

b. The presentence officer's sentence recommendations would give the court valuable guidance in arriving at a sentence.[87] The presentence officer, an officer of the court, would be an expert witness called by the court to render an expert opinion.[88] Accordingly, counsel should have reasonable opportunity for examination and rebuttal, although they should not be permitted to call their own experts to testify.[89] Ideally, the presentence officer would work closely with counsel for both sides in preparing the report, so that disputed matters would be resolved or clarified beforehand. Matters still in dispute after such consultation would be submitted to the court for resolution.

c. The system would eventually save time and expense. Uniform, thorough sentencing procedures reduce the need for protracted presentence hearings involving the testimony of parents, teachers, victims, counselors, commanders, work supervisors, and others. The same evidence would be summarized in the presentence report, appropriately emphasized and developed by the presentence officer. Counsel for both sides would be permitted, or perhaps required, to submit names, addresses, and synopsized testimony of sentencing witnesses to the presentence officer for inclusion in the presentence report.[90] The court would then receive, in essence, stipulations of expected testimony, obviating the need for live witnesses.[91]

Obviously, the role of counsel's advocacy would be reduced under such procedures. This would be a positive change. Adversarial procedures, which are useful for litigation of the narrower issues involved in motions and findings, are not as appropriate once guilt has been determined.

The main disadvantage of the presentence report is that it takes substantial time to prepare it. In contested cases with a substantial possibility of acquittal, it is not economical to begin preparing the report prior to the verdict.[92] Even under current procedures, contested cases with high maximum permissible punishments are often recessed for a week or more after guilty findings to allow counsel to prepare the presentence case. The majority of courts-martial involve guilty pleas; in these cases, processing time should not be significantly affected. Once informed that a guilty plea is to be entered, a presentence officer could begin to prepare for the presentence hearing, and should be able to complete most reports prior to trial.[93]

In contested cases, the presentence officer could do some basic preparation prior to findings, such as obtaining names of potential sentence witnesses, and reviewing the accused's military records. If presentence officers were to assume more of the burden of presentence preparation, counsel would be free to concentrate on motions and the merits, and might be ready to go to trial sooner in many cases.

The military judge would be able to control excessive delays in presentence report preparation. The judge could hasten a dilatory presentence officer by setting deadlines.[94] In cases that must be concluded rapidly, provision could be made for the military judge to dispense with the report, receive an incomplete report with a "best guess," or order an abbreviated report.[95] A normal case should not be prolonged more than a day or two, and delay for this purpose would be a small price to pay when balanced against the risk of a "hipshot" sentence by an uninformed court.

Because of the time and effort required, it would not be worthwhile to have a presentence report in all cases.[96] Use could be limited, for example, to general courts-martial, or as directed by the military judge or convening authority, or as requested by counsel. It should be employed in most general courts-martial. The requirement could be suspended or relaxed for special operational requirements and military exigencies. Even in cases in which the presentence report is not used, the influence of its general use would aid the court in formulating its presentence inquiry and sentence.

With the input of a military sentence officer, military sentencing would become a methodical, informed study, rather than a perfunctory "hit or miss" endeavor. Confidence in our justice system would be enhanced.

Establishment of sentence guidelines.

Court-martial sentencing normally involves selecting a punishment somewhere between the legal maximum and no punishment at all. For example, the maximum permissible punishment for wrongful distribution of a Schedule I, II, or III controlled substance[97] by an enlisted member is dishonorable discharge, forfeiture of all pay and allowances,

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[87] The presentence officer could recommend a specific sentence, as counsel may do under R.C.M. 1001(g), a sentence range, or perhaps limit the recommendation to the issues of discharge and confinement.

[88] Mil. R. Evid. 702; *see also* Mil. R. Evid. 706.

[89] Allowing counsel to call their own comparable experts would be unnecessarily expensive and time consuming. It would not be essential to a fair hearing because the presentence officer would be a neutral arm of the court, as is the civilian probation officer. Affording counsel the opportunity to question the presentence officer's opinions and conclusions, and to present factual matters in rebuttal would ensure a fair process.

[90] Subject to verification by the presentence officer, and admissibility under rules of relevance and privilege.

[91] Allowing testimony of witnesses in addition to the presentence report summaries would be at the discretion of the military judge. This should be granted, for example, when credibility of the witness is critical and the court's decision would be substantially aided by personal observation of the testimony.

[92] Furthermore, because of fifth amendment and article 31 rights, defense counsel may forbid interview of the accused concerning certain matters. The accused is certainly one of the most important sources of sentencing information. If the presentence officer is unable to interview the accused about the offense, the ultimate recommendation should perhaps be deferred until after the accused has exercised or waived his presentence allocution rights.

[93] In U.S. district courts, the presentence investigation can be ordered prior to conviction or plea. Fed. R. Crim. P. 32(c).

[94] Provision for presentence officer performance evaluations by military judges would further this purpose.

[95] *See* Fed. R. Crim. P. 32 (presentence investigation in all cases except by order of judge or waiver of defendant); *see also* Model Act, *supra* note 25, § 3–203 comment (use in misdemeanor cases discretionary) and § 3–204 (short form report); ABA Standards 18–5.1, *supra* note 44, (presentence investigation in every case where incarceration for one year or more possible, defendant less than 21 years old, or defendant waives and court has sufficient information).

[96] *Supra* note 95. When a presentence report is not feasible, sentencing procedures currently in use would be a reasonable alternative.

[97] Violation of UCMJ art. 112a.

confinement for fifteen years,[98] and reduction to the lowest grade.[99] A first offender who, without partaking, merely passes a marijuana joint to someone while home on leave is amenable to the same maximum punishment as a distributor who delivers a thousand hits of LSD and a canteen of PCP to a customer preparing to deploy to a combat zone. A sentencing authority might properly impose an article 15-type[100] punishment on the first offender, while sentencing the latter offender to the maximum permissible punishment. Unfortunately, in practice, the sentences are not always so rationally related to the offense.

Congressional or Presidential establishment of a mandatory minimum sentence,[101] such as a bad conduct discharge and one year of confinement for wrongful distribution of Schedule I, II, and III controlled substances, would not solve the problem. It would only slightly reduce the potential for sentence disparity in the latter case, and would result in a clear injustice in the former case. Setting a presumptive sentence,[102] such as a bad conduct discharge and two years confinement, would be much better. It would guide the court to a point on the normative scale, yet allow the court the discretion to choose a higher or lower punishment when warranted by the particular circumstances of the case.[103]

An even better method is to employ sentencing guidelines similar to those authored by the U.S. Sentencing Commission.[104] The commission's work was in response to a Congressional mandate to establish guidelines to increase certainty and reduce disparity in federal court sentencing.[105] Seeking to strike a balance between complexity and discretion, the Commission settled on an empirical approach.[106] After analyzing data from 10,000 cases, the Commission compiled relevant sentencing distinctions used by legislature, judges, and probation and parole authorities.[107] It adopted a "real offense" approach, based on identifiable characteristics and social harm, rather than the more generic "charged offense" approach.[108]

The Commission's scheme could be characterized as one of variable presumptive sentencing. At the core of the guidelines is the sentencing table,[109] reproduced as an Appendix. The vertical axis of the table consists of forty-three overlapping offense levels, quantified in months of confinement. A higher offense level carries a correspondingly higher confinement range. Offense levels for particular crimes have been set by determining the average sentence currently served for the offense, taking into account statutory penalties, parole guidelines, and other relevant factors.[110] The horizontal axis has six criminal history categories. Criminal history points are compiled based on numbers and lengths of previous sentences, whether the offense was committed less than two years after release from an earlier term of imprisonment, and whether the offense was committed while in probation, parole, work release, imprisonment, or escape status.[111]

The first step in applying the guidelines is to determine the base offense level, including any applicable specific offense characteristics. Adjustment is then made for special victim characteristics, extent of the defendant's role in the offense, and multiple counts. Further adjustment is then made for defendant's acceptance of responsibility, such as surrendering before arrest, voluntarily making restitution, and pleading guilty. Criminal history points are then tallied, followed by reference to the sentencing table and the guidelines for particular punishments set forth in chapter five of the sentencing guidelines. Finally, consideration is given to specific offender characteristics and other factors that may justify departure from the guidelines,[112] such as substantial assistance to authorities.[113]

For example, assume that the defendant is a school teacher who has been convicted of two counts of trafficking marijuana to school students. He has one prior conviction for drug use resulting in probation, and has served a few days in jail for drunk driving. Both sales involved about two kilograms (Kgs) of marijuana.

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[98] MCM, 1984, Part IV, para. 37e(2)(a).

[99] R.C.M. 1003(b)(5).

[100] Nonjudicial punishment under UCMJ art. 15.

[101] *See generally* Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 17 (1976) (rejecting flat time and mandatory minimum sentences in general).

[102] *Id.* at 19.

[103] The Task Force Study, *supra* note 78, contemplated a presumptive sentence system in which specific aggravating or mitigating factors would have to be established in order to vary from the presumptive sentence.

[104] U.S. Sentencing Commission Guidelines and Policy Statements 52 Fed. Reg. 18046 (1987) [hereinafter Sentencing Guidelines]. Another example of sentencing guidelines is the Model Act, *supra* note 25, § 3–110. *See also* ABA Standards 18–3.1 Commentary, *supra* note 44. For a discussion of state sentencing guidelines *see generally* N.I.J. *supra* note 50. The U.S. Sentencing Commission Guidelines, which became effective 1 November 1987, have been the subject of conflicting opinions as to whether they violate the separation of powers doctrine. *Compare* United States v. Arnold, No. 87–1279–B (S.D. Cal. filed Feb. 18, 1988), 42 Cr. L. 2377 *with* United States v. Ruiz-Villanueva (S.D. Cal. filed Feb. 29, 1988) 42 Cr. L. 2377.

[105] Comprehensive Crime Control Act of 1984, 28 U.S.C. § 994a (1984).

[106] Sentencing Guidelines, *supra* note 104, § 1.4, 52 Fed. Reg. 18049.

[107] *Id.* § 1.4, 52 Fed. Reg. 18049.

[108] *Id.* § 1.5, 52 Fed. Reg. 18049.

[109] *Id.* ch. 5, part A, 52 Fed. Reg. 18095–96.

[110] *Id.* §§ 1.10–1.11, 52 Fed. Reg. 18052.

[111] *Id.* § 4 A1.1, 52 Fed. Reg. 18092.

[112] *Id.* § 1 B1.1, 52 Fed. Reg. 18053.

[113] *Id.* § 5 K.1.1, 52 Fed. Reg. 18102. Other factors authorizing departure from the guidelines include: resulting death or serious injury, extreme psychological injury, abduction, property damage or loss, use of weapons, disruption of government function, extreme conduct, additional criminal purpose, victim's conduct, commission to avoid perceived greater harm, coercion and duress not amounting to a defense, diminished capacity, and endangerment of national security, public health, or safety. *Id.* §§ 5 K2.1–5 K2.14, 52 Fed. Reg. 18104–18105. Race, sex, national origin, creed, religion, and socio-economic status are specifically excluded as sentencing factors. *Id.* § 5 H1.10, 52 Fed. Reg. 18103.

The base offense level for trafficking of two Kgs of marijuana, not involving death, serious injury, or possession of a weapon, is level ten.[114] Because there are two counts, the level is increased, based on the total amount of drug in heroin equivalents.[115] The base offense level for the sum of four Kgs is level twelve.[116] Distribution to a person under age twenty one or within 1,000 feet of a school increases the offense level by two to level fourteen.[117] Because the offenses involved abuse of a position and trust, the offense level is raised to level sixteen.[118] Assume that the defendant demonstrated a recognition and acceptance of personal responsibility by confessing, resigning his position, freely relinquishing evidence, and pleading guilty. The offense level is reduced by two to level fourteen.[119] Defendant's two previous brushes with the law each give him one criminal point, placing him in criminal history category II. Refer to the sentencing table, and the imprisonment range is eighteen to twenty-four months. The range for fines at level fourteen is $4,000 to $40,000.[120]

Suppose now that the prosecution has stipulated that, since his arrest, defendant has given substantial assistance to authorities by doing high risk undercover work, which has led to the arrest of major drug dealers. This is an extraordinary mitigating factor that allows the court to depart from the guidelines and impose a sentence below the required minimum.[121] The sentencing judge must, however, specify on the record the reasons for departing from the guidelines.[122]

Military sentencing could follow a similar set of guidelines, formulated according to uniquely military considerations. In the foregoing scenario, for example, the sentence level was increased because a teacher abused his position by selling drugs to minor students. Along similar lines, military sentencing guidelines could provide for increased ranges of presumptive punishment for abuse of status, such as when a noncommissioned or petty officer distributes drugs on or near a military installation, or distributes them to junior military personnel or dependent children. These increases would be in addition to the aggravating circumstances already in the MCM.[123] Establishment of such guidelines in the MCM would not only bring about greater sentence uniformity, it would be an opportunity to reinforce and clarify substantive military norms.

Service-wide sentencing statistics and surveys of military judges, staff judge advocates, and others with substantial military justice roles would provide ample data on which to base offense levels and guideline criteria. We will have the advantage of being able to monitor the usage and evolution of the Sentencing Commission Guidelines in the U.S. district courts. With appropriate committee work, field comments, and advance field instruction, sentencing guidelines could be adapted and implemented as smoothly as the Federal Rules of Evidence were in 1980.

How would guidelines such as this work in members cases? It would be impractical for the military judge to instruct the members on a step-by-step application of guidelines in every case. Guidelines could, however, be used in members cases to narrow the sentence range. The military judge could determine minimum and maximum permissible punishments based on all possible mitigating and aggravating adjustments to the base offense level. In the previously discussed hypothetical scenario involving the drug dealing school teacher, the offense level range using this method would be ten to sixteen.[124] At Criminal History Category II on the Sentencing Table,[125] the sentence range for confinement would thus be eight to thirty months, a substantially narrower range than the zero to fifteen years for a similar offense under the MCM.[126]

Additionally, it might be feasible to inform the panel of the base offense sentence range, and allow them to apply different maximums or minimums based on specific aggravating or mitigating factors that they may find.[127]

Conclusion

Our current sentencing system is enigmatic; it is one of the few features of the military justice system that is inferior to that of other jurisdictions. It is only because of the conscientiousness and good judgment of most judges and members that the majority of court martial sentences are reasonably fair and proportionate, and serve the ends of good order and discipline. It is arguable that, because most sentences are reasonable, the system is not "broke," and does not need to be fixed; I disagree. A sentencing system with so much discretion, so little method, and such regularly manifested potential for whimsical sentences is not good enough. More detailed guidelines are needed. Courts need to be more completely and consistently informed about the

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[114] *Id.* § 2 D1.1, 52 Fed. Reg. 18064.

[115] *Id.* § 3 D1.2(d), 52 Fed. Reg. 18089.

[116] *Id.* § 2 D1.1, 52 Fed. Reg. 18064.

[117] *Id.* § 2 D1.3, 52 Fed. Reg. 18066.

[118] *Id.* § 3 B1.3, 52 Fed. Reg. 18088.

[119] *Id.* § 4 A1.1, 52 Fed. Reg. 18092.

[120] *Id.* § 5 E4.2, 52 Fed. Reg. 18099.

[121] *Id.* § 5 K1.1, 52 Fed. Reg. 18103.

[122] 18 U.S.C. § 3553(c) (1982).

[123] MCM, 1984, Part IV, para. 37e(2) (While on duty as sentinel or lookout, on board vessel or aircraft, in missile launch facility, while receiving special pay, in time of war).

[124] Base offense level for trafficking four Kg of marijuana: twelve less two levels for acceptance of personal responsibility; plus two levels for selling to underage person or near school; plus two levels for abuse of position or trust.

[125] *See* appendix.

[126] *See supra* note 95. The base offense level for drug trafficking would probably be set at a higher range in a military sentence matrix.

[127] For example, in the foregoing hypothetical, an instruction that, if the members find that the accused has demonstrated recognition and acceptance of responsibility, the minimum permissible sentence to confinement is eight months rather than twelve months.

accused, the offenses, and sentencing philosophy. Available expertise ought to be used to better advantage.

Skeptics might consider proposals like the three contained in this article as civilianization solely for the sake of civilianizing. Adoption of any one or a combination of the above proposals would actually serve unique military needs by promoting efficiency, good order and discipline, and respect for our system. They should not be rejected merely because civilians did them first. A more exacting sentencing process will not ensure a just sentence in every case. It will, however, minimize the likelihood of disproportionate sentences, and lend greater credence to our system of justice.

Appendix

SENTENCING TABLE

Criminal History Category

Offense Level	I 0 or 1	II 2 or 3	III 4, 5, 6	IV 7, 8, 9	V 10, 11, 12	VI 13 or more
1	0– 1	0– 2	0– 3	0– 4	0– 5	0– 6
2	0– 2	0– 3	0– 4	0– 5	0– 6	1– 7
3	0– 3	0– 4	0– 5	0– 6	2– 8	3– 9
4	0– 4	0– 5	0– 6	2– 8	4– 10	6– 12
5	0– 5	0– 6	1– 7	4– 10	6– 12	9– 15
6	0– 6	1– 7	2– 8	6– 12	9– 15	12– 18
7	1– 7	2– 8	4– 10	8– 14	12– 18	15– 21
8	2– 8	4– 10	6– 12	10– 16	15– 21	18– 24
9	4– 10	6– 12	8– 14	12– 18	18– 24	21– 27
10	6– 12	8– 14	10– 16	15– 21	21– 27	24– 30
11	8– 14	10– 16	12– 18	18– 24	24– 30	27– 33
12	10– 16	12– 18	15– 21	21– 27	27– 33	30– 37
13	12– 18	15– 21	18– 24	24– 30	30– 37	33– 41
14	15– 21	18– 24	21– 27	27– 33	33– 41	37– 46
15	18– 24	21– 27	24– 30	30– 37	37– 46	41– 51
16	21– 27	24– 30	27– 33	33– 41	41– 51	46– 57
17	24– 30	27– 33	30– 37	37– 46	46– 57	51– 63
18	27– 33	30– 37	33– 41	41– 51	51– 63	57– 71
19	30– 37	33– 41	37– 46	46– 57	57– 71	63– 78
20	33– 41	37– 46	41– 51	51– 63	63– 78	70– 87
21	37– 46	41– 51	46– 57	57– 71	70– 87	77– 96
22	41– 51	46– 57	51– 63	63– 78	77– 96	84–105
23	46– 57	51– 63	57– 71	70– 87	84–105	92–115
24	51– 63	57– 71	63– 78	77– 96	92–115	100–125
25	57– 71	63– 78	70– 87	84–105	100–125	110–137
26	63– 78	70– 87	78– 97	92–115	110–137	120–150
27	70– 87	78– 97	87–108	100–125	120–150	130–162
28	78– 97	87–108	97–121	110–137	130–162	140–175
29	87–108	97–121	108–135	121–151	140–175	151–188
30	97–121	108–135	121–151	135–168	151–188	168–210
31	108–135	121–151	135–168	151–188	168–210	188–235
32	121–151	135–168	151–188	168–210	188–235	210–262
33	135–168	151–188	168–210	188–235	210–262	235–293
34	151–188	168–210	188–235	210–262	235–293	262–327
35	168–210	188–235	210–262	235–293	262–327	292–365
36	188–235	210–262	235–293	262–327	292–365	324–405
37	210–262	235–293	262–327	292–365	324–405	360–life
38	235–293	262–327	292–365	324–405	360–life	360–life
39	262–327	292–365	324–405	360–life	360–life	360–life
40	292–365	324–405	360–life	360–life	360–life	360–life
41	324–405	360–life	360–life	360–life	360–life	360–life
42	360–life	360–life	360–life	360–life	360–life	360–life
43	life	life	life	life	life	life

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

Post Conviction Remedies

Captain Mary C. Cantrell
Defense Appellate Division

Introduction

Despite your best efforts as a defense counsel, your client has been sentenced by a general court-martial to a bad-conduct discharge, confinement for two years, forfeiture of all pay and allowances and reduction to the rank of Private (E-1). The soldier is in despair because of the hardship the sentence will have on his spouse and children or he may actually want the opportunity to "soldier back" into the Army and continue to serve on active duty.

Although most trial and defense counsel are well aware of the judicial relief available from the appellate courts, few are aware of the numerous post-conviction remedies and the supporting regulations. In *United States v. Hannan*,[1] Chief Judge Everett informed defense counsel:

> Because of the importance of such matters to an accused, his defense counsel should be aware of the rules and policies which will affect the practical impact of sentences to confinement. Indeed, valuable service may be rendered by a lawyer in assisting his client to receive more favorable treatment in connection with a sentence to confinement.[2]

As a defense counsel you can advise your client of the post-conviction remedies that are available to him and try to help him develop a positive attitude towards confinement.

The purpose of this article is to give defense counsel a brief review of the numerous post conviction remedies which include: Military Instruction Course, Clemency, Army Discharge Review Board, Army Board of Correction of Military Records, and Clemency from the Secretary of the Army. For an in depth analysis of the numerous post-conviction remedies a defense counsel should consult the appropriate governing regulations[3] and other publications.[4]

Military Instruction Course

Soldiers sentenced to confinement for four months to two years are generally confined at the United States Army Correctional Activity (USACA). Soldiers confined at USACA are eligible for "return to duty"[5] or "restoration to duty"[6] through the USACA Return to Duty Program, also known as the Military Instruction Course (MIC).

The Return to Duty Program consists of three phases. Phase I occurs during a prisoner's initial ten weeks of medium custody confinement. Phase I consists of extensive evaluations by social workers, a comprehensive record review, and a meeting with the USACA Assignment Board. The Assignment Board makes an initial determination on the potential of the prisoner to return or be restored to duty. Prisoners receiving a positive evaluation from the Assignment Board are then carefully monitored and evaluated by the USACA cadre. Even though a prisoner may not receive a favorable evaluation from the Assignment Board he may be able to convince the USACA cadre of his potential and be enrolled into the Program.

Phase II generally requires at least ninety days in minimum custody. Prisoners who have completed their confinement but who have not served ninety days in minimum custody may request assignment to the USACA holding platoon in order to complete Phase II. Prisoners in minimum custody are not subject to restraint by bars, wires, or guards. During Phase II, prisoners are evaluated on their performance in a less restrictive environment. In order to proceed to Phase III, a prisoner must have favorable recommendations from the USACA cadre and be personally selected by the USACA commander.

Once a prisoner is selected to attend Phase III, his confinement and forfeitures are suspended. Those who attend

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[1] *United States v. Hannan*, 17 M.J. 115 (C.M.A. 1984).

[2] *Id.* at 122.

[3] Army Reg. 15–130, Boards, Commissions, and Committees: Army Clemency Board (15 Apr. 1979) [hereinafter AR 15–130]; Army Reg. 15–180, Boards, Commissions, and Committees: Army Discharge Review Board (15 Oct. 1984) [hereinafter AR 15–180]; Army Reg. 15–185, Boards, Commissions, and Committees: Army Board for Correction of Military Records (18 May 1977) [hereinafter AR 15–185]; Army Reg. 190–47, Military Police: The United States Army Correctional System (1 Oct. 1978) [hereinafter AR 190–47].

[4] Phillips, *The Army's Clemency and Parole Program In the Correctional Environment: A Procedural Guide and Analysis*, The Army Lawyer, July 1986, at 18. McCoy, *Relief from Court-Martial Sentences at the United States Disciplinary Barracks, The Disposition Board*, The Army Lawyer, July 1986, at 64. Sickendick, *The Military Instruction Course*, The Army Lawyer, May 1987, at 39.

[5] AR 190–47; Return to duty describes the procedures when a prisoner whose sentence includes confinement without a punitive discharge or the punitive discharge has been remitted or suspended by the convening authority or appellate reviewing agencies, or the appellate process is still pending and the discharge has not yet been executed.

[6] AR 190–47; Restoration to duty describes the procedures when a prisoner who was sentenced to confinement and a punitive discharge or dismissal and the discharge of dismissal has been executed.

Phase III are no longer considered prisoners. Phase III consists of a four week Military Instruction Course (MIC) administered by drill sergeants. The course emphasizes basic military skills and exacting discipline. Upon completion of the course, the USACA commander must personally approve each candidate for graduation. Upon graduation, the punitive discharge and the remaining unexecuted sentence are remitted. Candidates who were previously restored to duty have any unexecuted portion of their sentence remitted. MIC graduates are immediately assigned to regular units upon graduation.

The USACA Return to Duty Program is highly selective with only about five percent of all USACA prisoners selected to attend MIC. Once selected to MIC, a prisoner's chances for graduation and return to duty are extremely high.

Clemency

Soldiers confined to the United States Disciplinary Barracks (USDB) and the United States Army Correctional Activity (USACA) are eligible for clemency[7] through a three-tiered process. Clemency may take the form of reduction in confinement, substitution of an administrative discharge for a punitive discharge, remission of confinement, or the advancement of the parole date. The three-tiered process consists of consideration by a disposition board convened at the correctional facility, consideration by the commander of the correctional facility and finally consideration by the Army Clemency Board, in Washington D.C.

The disposition board consists of three impartial voting members with corrections or military police experience. The board president is a senior captain or a field grade officer; there is also a company grade officer and a senior noncommissioned officer on the board. The disposition board may include nonvoting members such as social workers, legal advisors, or reporters.

The board is conducted in accordance with Army Regulation 15–6. A prisoner may personally appear before the board and testify under oath. Prisoners are also allowed to call witnesses on their behalf at the board. The board reviews the clemency action packet and any other matters submitted by the prisoner. The clemency action packet contains the prisoner's military personnel records jacket (MPRJ); correctional treatment file; mental hygiene report prepared, at the correctional facility; record of trial, if available; the post-trial SJA recommendation; an FBI records check; and any other matters submitted by the prisoner. The prisoner is assisted in assembling the clemency action packet by a case analyst, who also submits a recommendation concerning clemency. The case analyst may also attend the Disposition Board as a nonvoting member.

The criteria used by the disposition board to determine whether clemency is appropriate are general in nature, such as age of the prisoner at the time of the offense, military record, family needs, nature of offense, etc.[8] The decision to grant clemency is purely subjective on the part of the board members. The disposition board attempts to affect uniformity in sentence for similar offenses through the clemency process.

After the board proceedings, the members deliberate in a closed session and prepare written recommendations. A minority opinion may also be submitted with the recommendation. The proceedings and recommendations are forwarded to the Staff Judge Advocate for a legal sufficiency review and then to the correctional facility commander for action. The commander reviews the proceedings and recommendations. As the general court-martial convening authority, he may order immediate commutation, suspension, or remission of the prisoner's sentence or a portion thereof. The clemency petition is automatically forwarded to the Army Clemency Board (ACB) if the commander does not grant complete clemency on all remaining unexecuted or unserved portions of the prisoner's sentence.

The final tier of the clemency process is the ACB in Washington, D.C. Upon arrival at the ACB, the clemency petition is independently evaluated by a case analyst. The ACB case analyst may contact the correctional facility case analyst in order to verify any ambiguities in the proceedings and recommendations. The case analyst submits a recommendation to the ACB concerning the petition. The ACB considers all previous recommendations by the correctional facility personnel and the ACB case analyst. Prisoners or witnesses are not allowed to be present at ACB official sessions.

The ACB does not have independent power to grant clemency; recommendations are forwarded to the Deputy Assistant Secretary of the Army who has been delegated clemency authority by the Secretary of the Army. Action by the Deputy Assistant Secretary completes the clemency process.

The automatic clemency process is performed yearly on every prisoner at the USDB and USACA. Automatic clemency reviews continue until a prisoner is released from confinement or is released from parole supervision. A prisoner may submit a special petition for clemency at any time as long as any part of an approved court-martial conviction remains unexecuted, unapplied, or unserved. A special clemency petition is justified when an unexpected catastrophic event occurs requiring the prisoner's long term presence at home such as the death of a spouse or parent which affects the care of children. A special petition for clemency should only be used when automatic clemency review was unfavorable or will not provide timely results.

A special petition for clemency must specifically state the form of clemency requested and the facts that justify special clemency consideration. Recommendations as to the status of the special petition for clemency are submitted by the correctional facility cadre. The correctional facility commander determines whether there are sufficient grounds for special clemency consideration. If sufficient grounds are present, the special clemency petition is submitted to the Clemency Disposition Board for review and recommendation. The Board's recommendations are forwarded to the facility commander who may approve the petition or refer it to the ACB with recommendation for approval or denial.

[7] AR 15–130 and AR 190–47.

[8] USDB Mem 15–1. para. 12–2.

Prisoners pending an automatic clemency review may not submit a special clemency petition until final action has been taken by the ACB. If an automatic clemency review is pending, the special clemency petition is joined with the ongoing clemency review at whatever tier it may be.

A defense counsel may enhance his client's opportunity for clemency in numerous ways. The defense counsel should insure that initial promulgating orders and electrical messages, SJA recommendations, and Judge Advocate reviews are quickly forwarded to the correctional facility. A stipulation of fact indicating mitigating circumstances surrounding the offenses will assist in determining if clemency is warranted. Any post-action recommendations for clemency, even if not acted upon by the convening authority, should be forwarded to the correctional facility. A copy of all favorable matters raised by the defense in extenuation and mitigation should be sent to the correctional facility. All of these items are present in the record of trial, but the record does not always arrive at the correctional facility before the disposition board convenes. The defense counsel may also contact the client's case analyst at the correctional facility and the ACB to discuss the client's case and present it in a favorable light. Last of all, the defense counsel should advise the soldier about the importance of his attitude and behavior during confinement if he is seeking clemency.

The success rate for a clemency petition is very low. Clemency has been granted in less than ten percent of the petitions presented. When the clemency is granted, it usually takes the form of remission or suspension of confinement or relief in the area of forfeitures.

Army Discharge Review Board

A soldier may petition the Army Discharge Review Board[9] (ADRB) for an upgrade of a discharge. The ADRB reviews administrative discharges and bad conduct discharges adjudged by special court-martials. The ADRB will not review discharges that are older than fifteen years.

The objective of the ADRB is to examine the propriety and equity of an applicant's discharge and to apply factors historically consistent with an honorable discharge. Discharges are deemed proper unless it is determined that there is substantial doubt that the discharges would have remained the same if prejudicial error had not been made or if there's a retroactive change in Army policy that affects the soldier's discharge. Discharges are deemed equitable unless current policies and procedures for discharges differ in material respect from those when the applicant was discharged; or the discharge was inconsistent with Army standards of discipline; or relief is warranted based upon the applicant's quality of service and matters presented to the ADRB viewed in light of the grounds for discharge. ADRB also reviews the quality of service and the capability to serve. These traits are evidenced by service history, awards, decorations, combat service, individual background, family problems, discrimination, etc.[10]

Before submitting an application for a discharge review, applicants should request a copy of their military records and, if applicable, medical records. Upon receipt of the records, applicants should review the records to insure that they are complete and contain no errors. Applicants must submit a DD Form 293 along with support documents to the ADRB. Form 293 provides applicants an opportunity to request a specific change in the discharge, and the type of discharge deserved. Applicants may request the ADRB to consider specific issues that they believe forms a basis for the change in the discharge. Once in receipt of Form 293 and supporting documents, the ADRB will notify applicants that they may request a hearing and appear before the ADRB. At the hearing, applicants may be represented by counsel, call witnesses to testify on their behalf, and testify themselves. The ADRB will consider all relevant evidence before making a decision in a closed session by majority vote.

Applicants are not required to have a rehearing, instead they may request a record review. The ADRB will review the Form 293, military records and matters submitted by applicants in order to make a determination. The ADRB will notify applicants of the decision and the grounds for the decision.

Once the ADRB makes a determination, the issue is not subject to reconsideration by the ADRB unless the original review did not involve a hearing and a hearing is now desired, or the applicant has retained counsel to represent him when he did not have one at a prior hearing.

The president of the ADRB may forward cases to the Secretarial Reviewing Authority (SRA) for consideration. Applicants are notified of the forwarding and are allowed to submit additional evidence or rebuttal. Once the SRA makes a determination, applicants are notified of the determination and the basis for it.

Once an application is submitted, it takes 6 to 18 months for a decision. If the applicant has appeared before a hearing, a decision is usually made within six weeks after the hearing. Applicants who request only a records review will receive a decision within six months.

Army Board for Correction of Military Records

A soldier may petition the Army Board for Correction of Military Records (ABCMR)[11] to upgrade a discharge received from a general court-martial or from a SPCM if the ADRB petition was denied. The soldier must petition the ABCMR within three years of discovery of the alleged error or injustice. If a soldier files a petition after the three-year deadline, he must inform the ABCMR of the reasons that the ABCMR should find that it is in the interest of justice to excuse the failure to file within three years. Before applying to the ABCMR for relief, the soldier must exhaust all effective administrative and legal remedies that are practical and available to him.

Before submitting a petition to the ABCMR, a soldier should request his military records, to include medical records, if applicable, in order to review them for completeness and error. The soldier must submit a DD Form 149 along with all supporting documents to the ABCMR for review. The applicant must carefully explain the reasons why the

[9] AR 15–180.

[10] AR 15–180, Appendix A.

[11] AR 15–185.

discharge should be upgraded, such as material error or injustice. The applicant needs to submit evidence explaining why the discharge was unfair and any other supporting documents.

Upon receipt of the application, the ABCMR reviews all pertinent military records and the matters submitted by the applicant. During the review, a determination will be made on whether to authorize a hearing, or deny the application without a hearing.

In those cases that the ABCMR requests a hearing the applicant may personally appear at the hearing with counsel. The applicant is also permitted to present witnesses on his behalf at the hearing, or may present other evidence in support of his case. Following a hearing, the ABCMR will make written findings, conclusions, and recommendations. A majority vote by the members of the ABCMR will constitute the action of the ABCMR. The record of the proceedings and recommendation, except those denied by the ABCMR without a hearing, are forwarded to the Secretary of the Army for action. After action by the Secretary of the Army, the applicant will be notified. If the application is denied, the applicant will be informed of the basis for denial.

Reconsideration of an application will only be granted upon a presentation by the applicant of newly discovered relevant evidence and then only upon recommendation of the ABCMR and approval by the Secretary of the Army.

Secretary of the Army

A soldier may petition directly to the Secretary of the Army for relief in the form of a suspension of all or part of the sentence or substitution of an administrative discharge for the adjudged punitive discharge.[12]

Petitions for relief to the Secretary require no particular format, but do require that the petitioner seek relief under the provisions of article 74, UCMJ. Along with the petition, the soldier may submit any supporting documents for review.

Conclusion

Post conviction remedies offer a soldier a way to ameliorate his sentence. The success of the post conviction remedy often depends on the effort put forth by the client in gathering evidence and conforming his behavior to the rigid standards of the confinement facility.

Defense counsel can assist their clients in successfully achieving a post-conviction remedy by fully informing their clients of the different types of post-conviction remedies and the criteria for each. The defense counsel should copy and forward to the client any favorable evidence from the trial or pretrial investigations so that the client may include the information in petitions for post conviction remedies. Defense counsel need to stress to the client the importance of his behavior and attitude from the moment he arrives at the confinement facility until he is released.

Even though petitioning for a post conviction remedy requires dedicated effort by a convicted soldier, a favorable result can greatly improve his future. Therefore, defense counsel are encouraged to take heed of Chief Judge Everett's advice and prepare their clients for post-trial remedies.

[12] Uniform Code of Military Justice art. 74, 10 U.S.C. § 874 (1984).

DAD Notes

When a Military Judge Knows Too Much

In the March 1988 issue of *The Army Lawyer,* Captain William E. Slade of this Division analyzed the law governing the disqualification of a military judge.[1] The focus of the Article revolved around *United States v. Sherrod,*[2] a case that was then pending before the Court of Military Appeals. On 25 April 1988, *Sherrod* was decided and the court adopted the rule of presumptive prejudice advocated by Captain Slade.[3] The acceptance of this rule clearly delineates responsibility and preserves public confidence in the administration of military justice. Defense counsel should interpret *Sherrod* as a signal to actively pursue inquiries about the military judge. The task of those at the trial level is to use the logic compelling the result in *Sherrod* beyond the personal relationships that were involved.

In *Sherrod,*[4] the Court of Military Appeals fashioned a rule that almost always compels the recusal of a military judge whenever (1) the defendant has offered a "well founded challenge for cause" against the judge and (2) that judge would have been disqualified to sit as a judge alone. Furthermore, if the requisite conditions are met, prejudice must be assumed because the court has determined that any actions taken by a disqualified military judge, other than successfully effecting the recusal process, "are void." In finding a presumption of prejudice, the court reversed the decision of the Army Court of Military Review and held that a judge that "is disqualified to sit as judge alone . . . is also disqualified to sit with members."[5]

In *Sherrod,* the military judge advised the parties to the trial that he knew the victim's family well. The military

[1] Slade, *The Disqualified Judge: Only a Little Pregnant,* The Army Lawyer, Mar. 1988 at 20.

[2] 26 M.J. 30 (C.M.A. 1988).

[3] 26 M.J. 30 (C.M.A. 1988).

[4] 26 M.J. 30.

[5] For a more detailed analysis regarding the interplay of the relevant case law and rules of procedure, *see* Slade, *supra* note 1.

judge stated that he could nonetheless discharge his duties in a proper manner and assured counsel that he would not accord the victim's testimony a special status. Out of an abundance of caution, the military judge attempted to further insulate himself from the decision-making process and denied the accused's request for trial by judge alone. Notwithstanding the trial judge's sincere belief that he could thereby impartially preside over a court with members, the *Sherrod* court determined that the appearance of impropriety was not cured.

The court stated that the right to proceed with trial by judge alone is not absolute; nonetheless, it is a right to be accorded a military defendant.[6] In determining the extent of such a right, the court noted that under the Rules for Courts-Martial this right could not be arbitrarily withheld and "should be granted unless there is substantial reason why, *in the interests of justice,* the military judge may not sit as factfinder."[7] Under these and similar circumstances, any interests in judicial economy or effective management of cases must be presumed to be of secondary importance when an appearance of impropriety is present.

This language does not suggest that all questions of fairness require recusal. The court was careful to distinguish this case from the situation where a military judge is judicially exposed to information about an accused or the pending case. In such a class of cases, the court will not substitute their judgment for the sound discretion of the military judge. The implication seems to be, and the defense should argue, that information gathered from casual or personal relationships is inherently suspect. Further, the threshold for disqualification is extremely low because such extra-judicial information is not gathered while the judge is on the record. Instead, the information has been absorbed by the military judge in an environment that is not readily subject to investigation or objective analysis.

In the face of impropriety, the court did acknowledge at least one significant exception to its holding. Military necessity may militate against recusal whenever there is an appearance of impropriety.[8] Conversely, the language of the court does not go so far as to say that military necessity will defeat attempts at recusal when an *actual* appearance of impropriety is found to exist.

As a footnote, the court approved the analysis of the Army Court of Military Review on the issue of waiver.[9] Summarizing the opinion of the lower court, a subsequent request for a judge alone forum does not waive an objection to the qualification of the military judge to preside over the court-martial.[10]

Defense counsel should seek to carefully explore the matters known to the military judge. This may be particularly true in the case of a well-publicized and emotionally-charged crime. In such a situation, it is likely that the military judge has been exposed to information outside the judicial process. A properly developed record is essential to demonstrate grounds for disqualification based upon the appearance of impropriety. Captain Ralph L. Gonzalez.

Social Worker as Investigator—Article 31 Rights Required

Defense counsel should be aware of *United States v. McClelland,*[11] a recent Army Court of Military Review decision of a government appeal under article 62a, Uniform Code of Military Justice. The court upheld a military judge's evidentiary ruling that a social worker (in this instance, a Major) had a duty to advise the accused of his rights under article 31(b), UCMJ![12] Additionally, the court's decision underscored the need for defense counsel to make as complete a factual record as possible when raising motions to suppress.

In *McClelland,* the accused and his wife sought help from a social worker when allegations of child sexual abuse were raised by a stepdaughter.[13] Although the social worker had reason to suspect the accused of an offense, he did not advise the accused of his article 31 rights before seeking a damaging admission from him.[14] After the accused admitted some misconduct, the social worker advised the accused to seek legal counsel and then contacted the Criminal Investigation Command and informed them of the accused's admission.[15]

Applying the test set forth in *United States v. Duga,*[16] the Army Court of Military Review in *McClelland* upheld the military judge's ruling that the social worker had the obligation to advise the accused of his rights under article 31(b).[17] The social worker's actions satisfied the first prong of the *Duga* test because he was acting as an investigator seeking a criminal admission rather than assisting the accused, who had come to him as a patient. The court described the social worker's attitude and function when he questioned the accused as "that of an investigating Army official."[18] The court went on to hold that, "The dichotomy of rank between the parties [the social worker Major and the accused Sergeant First Class] coupled with [the] tenor of the meeting indicate that the [accused's] perception of

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[6] Uniform Code of Military Justice, art. 16(1), 10 U.S.C. § 816(1) (1982).

[7] 26 M.J. at 32, *citing* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 903(c)(2)(B) discussion.

[8] 26 M.J. at 33.

[9] 26 M.J. at 32 n.5.

[10] *United States v. Sherrod,* 22 M.J. 917, 922 (A.C.M.R. 1986).

[11] 26 M.J. 504 (A.C.M.R. 1988).

[12] *Id.* at 508.

[13] *Id.* at 505.

[14] *Id.*

[15] *Id.*

[16] 10 M.J. 206 (C.M.A. 1981). The two prongs of the *Duga* test are whether "a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation and whether the person questioned perceived that the inquiry involved more than a casual conversation." *Id.,* at 210.

[17] *McClelland,* at 508.

[18] *Id.*

the event was considerably more than that of a casual conversation."[19] Thus, the second prong of the *Duga* test was also satisfied.

As a result of the court's decision in *McClelland*, defense counsel should closely scrutinize the nature of the involvement by social workers and other professionals when an accused has made damaging admissions in the course of treatment or counselling regarding child or spouse abuse. If defense counsel can establish on the record that social workers or other professionals were acting as an investigatory arm of the government, then such persons will be deemed officials who must advise suspects of their rights under article 31(b), UCMJ.

The court's decision also underscores the need to develop a good factual basis whenever a legal issue is raised. When the government appeals an evidentiary ruling pursuant to article 62a, the Army Court of Military Review is bound by the military judge's factual findings, unless they are erroneous as a matter of law.[20] Therefore, the court is restricted to a determination of whether the trial judge correctly applied the law to the facts as they are found by the trial judge.

In *United States v. McClelland*, the defense counsel, through cross-examination of government witnesses, laid a good factual foundation that the social worker was acting as a criminal investigator when questioning the accused about possible sexual abuse of his stepdaughter. Defense counsel also showed that the statements subsequently obtained from the accused's family members (one of whom was the alleged victim) were derived from the accused's unwarned confession to the social worker. The military judge suppressed this evidence on two grounds. First, the accused's statement was taken in violation of article 31, UCMJ, and the statements of his family members were derived from his unwarned statement.[21] Second, the accused's due process rights had been violated by the conflicting Army policies of encouraging soldiers to seek assistance for their abusive behavior and then prosecuting them when they seek help.[22] Because a solid factual predicate had been laid to establish that the accused's statement had been taken in violation of article 31, UCMJ, and that his family's statements were derivative evidence thereof, the Army Court of Military Review could not hold that the military judge's ruling under article 31(b) was erroneous as a matter of law.[23]

The Army Court of Military Review did state, however, that the evidence in the record was insufficient to support the military judge's ruling that due process mandated suppression of the accused's confession.[24] The military judge found a violation of due process because the Armed Forces Network aired radio and television commercials urging abusers and others involved in abusive incidents to seek help from the Army and then sought to prosecute the abusive individual who was seeking help. The Army Court of Military Review determined that the evidence in the record did not establish that the accused or his family were aware of and relied on these commercials in seeking assistance from Army authorities.[25] Thus, because there was insufficient evidence presented to support the military judge's legal conclusion, the court could not uphold this basis for suppression.

Defense counsel should always make the factual record as complete as possible when raising a motion, and should try to establish a factual basis for each and every aspect of their argument on the issue. The benefit of this approach, should the government appeal an adverse ruling, is that it provides the Army Court of Military Review with a broad foundation for upholding the military judge's ruling. Captain Stephanie C. Spahn.

Don't Let The Finance Office Ignore A New Review and Action

When the military appellate courts find error in the post-trial recommendation and approval process, they may cure the defect by setting aside the original action and ordering a new recommendation and action from the same or another convening authority. While the net legal effect of this process may be nothing more than a new action which mirrors the original one, trial defense counsel should carefully monitor the command's administrative handling of the order setting aside the original action. Where the initial action included forfeitures, their clients should end up with some amount of back pay if the court order is handled correctly.

This result follows from article 57(a) of the Uniform Code of Military Justice, which provides that "no forfeiture may extend to any pay and allowances accrued before the date on which the sentence is approved by the [convening authority]."[26] When the original action (*i.e.*, approval) is set aside, any previous and current collections of forfeitures from pay (and possibly allowances) become, in effect, "premature" and, therefore, subject to return to the client. Furthermore, because these cases generally involve one or more punishments which cause an automatic reduction to pay grade E–1 upon approval of the punishments by the convening authority,[27] the voiding of that approval likewise

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[19] *Id.*

[20] *Id.* at 506, *citing* United States v. Burris, 21 M.J. 140 (C.M.A. 1985) and United States v. Austin, 21 M.J. 592 (A.C.M.R. 1985). The Army Court opined that a ruling is erroneous as a matter of law "when the factual finding upon which it is based is unsupported by any substantial evidence or when that finding is against the clear weight of the evidence." *Id.*

[21] *Id.* at 508.

[22] *Id.* at 505.

[23] *Id.* at 508.

[24] *Id.* at 505.

[25] *Id.*

[26] Uniform Code of Military Justice, art. 57(a), 10 U.S.C. § 857(a) (1982) [hereinafter UCMJ].

[27] *See* UCMJ art. 58a(a). (Approval of dishonorable or bad-conduct discharge, confinement, or hard labor without confinement automatically carries reduction to pay grade E–1). Note that actual service of confinement immediately following trial is not the event which invokes the automatic reduction; in fact, such confinement prior to approval is permitted only by virtue of Article 57(b), UCMJ. Thus, the fact that the client has been confined does not affect the analysis.

renders the initial application of article 58a, UCMJ, "premature." This entitles the client to receive the difference between pay and allowances for an E–1 and pay and allowances for a soldier at the client's pay grade at the time of his court-martial, for the period between the original and subsequent actions.[28] For an E–6 or E–7 with a large number of years in service, this could amount to a respectable sum, particularly if the post-trial and appellate processes are spread out over several months.

The unconventional nature of an order setting aside an action also protects the client from the application of article 75(a), UCMJ, which excuses restoration of rights and privileges when a rehearing or new trial adjudges punishments which include the executed parts of the previous sentence. Because this form of "conditional" restoration applies only to instances where the original sentence is set aside or disapproved, and is then followed by a rehearing or new trial, it clearly does not apply to proceedings which affect only the post-trial conduct of the convening authority and staff judge advocate. While an aggressive local finance office might assert that article 75(a) should be followed by analogy, it would do so contrary to the opinion of the U.S. Army Finance and Accounting Center.[29]

Although the trend is moving away from the use of the new recommendation and action to remedy some post-trial errors,[30] counsel should keep this ancillary benefit for their clients in mind. This is particularly so for clients who are on excess leave and thus subject to being forgotten. Be aware that finance offices have some discretion as to when they pay these monies, and they might want to defer settling the account until the new action is taken. Sooner or later, however, they must reimburse the client, and a little attention from counsel will ensure the proper execution of this responsibility. This is a good opportunity to help clients get something tangible during the appellate process. Captain Stephen W. Bross.

Raising Errors in the Staff Judge Advocate's Post-Trial Recommendation

In a recent case, *United States v. Lohrman,*[31] the Army Court of Military Review reemphasized the importance of trial defense counsel taking sufficient time to review the post-trial recommendation of the staff judge advocate and bringing errors in the recommendation to the attention of the convening authority. In *Lohrman,* the convening authority dismissed two specifications of uttering checks with intent to defraud when he referred the remaining charges and specifications against the accused to court-martial. At the same time he dismissed those two specifications, he accepted a pretrial agreement regarding the charges and specifications of which the accused was ultimately found guilty. In addition to the offenses to which the accused pled guilty and was found guilty, the staff judge advocate erroneously informed the convening authority in the post-trial recommendation that the accused had been found guilty of the two specifications that had been previously dismissed. The trial defense counsel elected not to submit any matters in response.

The accused claimed on appeal that he was materially prejudiced by the staff judge advocate's erroneous recommendation. The Army Court of Military Review found that the staff judge advocate committed error by misreporting the court-martial findings.[32] The court held, however, that the error in the staff judge advocate's recommendation did not constitute "plain error."[33] The court then held that the error had been waived by the trial defense counsel who failed to bring the matter to the convening authority's attention.[34]

Failure of a trial defense counsel to comment on substantial errors in the staff judge advocate's recommendation probably would not result in waiver of the issue.[35] Additionally, errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings" would not be waived if not raised by trial defense counsel.[36] In order to determine whether an error is substantial or if it seriously affects the integrity or public perception of military judicial proceedings, thus meeting the plain error standard, the *Lohrman* court stated that a review of the error in the context of the entire record is required.[37]

In reviewing the entire record, the court considered the fairness of the trial and post-trial proceedings, the type of conduct that comprised both the litigated and dismissed offenses, the appropriateness of the sentence, and the necessity of taking corrective action to protect the integrity and public reputation of the court. After reviewing the error in this context, the court concluded that plain error did not occur in this case and affirmed the findings and the sentence.

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[28] Note that in the rare, but not unheard of, event that a soldier is returned to duty following successful rehabilitation during confinement, and the original action is set aside during that time, the soldier should be entitled to wear the rank held at the time of the court-martial until the new action. Of course, as a practical matter, it may be confusing for other unit members to see this soldier arrive in the unit as an E–1, receive an unexplained promotion to a higher grade (possibly beyond any promotions earned while in the new unit), and then revert to wearing E–1 rank with no visible explanation such as punishment under article 15, UCMJ. It may also be confusing for the personnel office to determine how to handle the grade adjustments, since the regulation does not address this precise situation. *See* Army Reg. 600–200, Personnel—General: Enlisted Personnel Management System (5 Jul. 1984), Chapter 6, Sections I and V, [hereinafter AR 600–200]. Counsel advising a client in such a case should consider asking the convening authority to suspend the unexecuted part of the approved sentence to permit probationary retention of the client in his or her former rank or any intermediate rank pursuant to paragraph 6–3d(2), AR 600–200, which is an exercise of the Secretary's power, derived from article 58a(a) itself, to modify the operation of article 58a(a). In this connection, note that confinement that has already been served cannot be suspended. United States v. Lamb, 22 M.J. 518 (N.M.C.M.R. 1986).

[29] Letter, HQ, U.S. Army Finance and Accounting Center, FINCL, 12 Apr. 1988, Subject: Financial Consequences of New Review and Action.

[30] *See, e.g.,* United States v. Thompson, 26 M.J. 512, 514 (A.C.M.R. 1988), *petition for review filed,* No. 60,229/AR, (C.M.A. 6 May 1988).

[31] ACMR 8701627 (A.C.M.R. 29 Apr. 1987).

[32] *Id.,* slip op. at 2.

[33] *Id.,* slip op. at 3.

[34] *Id.,* slip op. at 2.

[35] *Id.,* slip op. at 2, fn. 1, *citing, inter alia,* United States v. Goode, 1 M.J. 3, 6 (C.M.A. 1975).

[36] United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986), *citing,* United States v. Atkinson, 297 U.S. 157, 160 (1936).

[37] *Lohrman,* slip op. at 2.

The accused in *Lohrman* may or may not have received sentence relief had the trial defense counsel raised the staff judge advocate's error to the attention of the convening authority. The point is that the accused, nonetheless, missed an opportunity for sentence relief at the convening authority level due to the inattentiveness of trial defense counsel. The Court of Military Appeals recently stated in *United States v. DeGrocco*[38] that submission of matters by the trial defense counsel for consideration by the convening authority is clearly crucial to an accused who desires sentence or other relief because the action of the convening authority is the only field-level review of cases in which an accused receives a punitive discharge. The *Lohrman* court reminds trial defense counsel that the client is entitled to zealous attorney representation even after the trial has terminated. Thus, trial defense counsel should pay careful attention to details in all phases of a case. Captain Wayne D. Lambert.

[38] 25 M.J. 146, 147 (C.M.A. 1987).

Government Appellate Division Note

Down Into the Maelstrom: COMA Decides *Carter*

Captain Gary L. Hausken
Chief, Branch I, Government Appellate Division

With its recent decision in *United States v. Carter*,[1] the Court of Military Appeals again wrestled to apply federal court criminal jury trial standards to courts-martial. In a holding that represents a significant change to military practice, the court held that a military judge may award an accused additional peremptory challenges when necessary to ensure a fair trial. Of greater significance than the actual holding, however, may be the conceptual approach the judges used in reaching this conclusion.

In concluding that military judges have the power to grant additional challenges to individual defendants, the Court of Military Appeals judicially legislated broad new powers for the military judges. In so doing, the court found a previously unknown right to peremptory challenges within the constitutional right to a fair trial. This article will analyze the court's opinion in *Carter* in light of the potential effect that the opinion may have on the military justice system.

I. The Court Abandons *United States v. Holley*

In reaching its holding in *Carter* the court rejected its earlier decision in *United States v. Holley*.[2] In *Holley*, as in *Carter*, the defense contended *inter alia* that the military judge had inherent authority, pursuant to article 41(b),[3] to grant additional challenges. In rejecting this argument, Judge Fletcher, writing for the court, noted:

> In our opinion, Congress was quite capable of drafting a statute which would expressly impart to the military judge the discretionary power to grant additional peremptory challenges at courts-martial. . . . This conclusion is buttressed by the fact that Congress expressly provided authority for such permissible peremptory challenges in criminal cases involving multiple defendants before federal civilian courts. Fed. R. Crim. P. 24 (b). . . . This specific and limited authorization seriously undermines the argument that Congress intended the word "entitled" in these peremptory-challenge statutes to impart a similar discretionary power in cases involving a single defendant.[4]

Chief Judge Everett dissented from the holding in *Holley*, for substantially the same reasons as he presented in his lead opinion in *Carter*.[5] Four years later, the two member[6] majority in *Holley* having left the court, Chief Judge Everett's dissent comes to the forefront.

II. The *Carter* Analysis

In both *Carter* and *Holley*, the court's determination of the number of peremptory challenges an individual accused may be granted is focused on the word "entitled," as found in article 41(b).[7] In *Holley*, the court had taken a straightforward approach: each accused has the right to only one peremptory challenge, whether or not members are added

[1] 25 M.J. 471 (C.M.A. 1988).

[2] 17 M.J. 361 (C.M.A. 1984).

[3] Uniform Code of Military Justice, article 41(b), 10 U.S.C. § 841(b) (1982) [hereinafter UCMJ]:
Each accused and the trial counsel is *entitled* to one peremptory challenge, but the military judge may not be challenged except for cause. (emphasis added).

[4] *Holley*, 17 M.J. at 366–67 (citations and footnotes omitted).

[5] *Compare Id.* at 371–74 *with Carter* at 473–76.

[6] Judge Fletcher wrote for the court, Judge Cook concurred without opinion.

[7] *See, supra*, note 3.

to the court at a later time.[8] The three opinions in *Carter* present a more complex reading of the statutory language.[9] The most troublesome, however, is the lead opinion of Chief Judge Everett.

The Chief Judge found that article 41(b) contains inherent authority for the military judge to grant an accused more than one peremptory challenge and that the failure of the military judge to do so may result in either a denial of a fair trial or an abuse of the judge's discretion.[10] His conclusion is based upon several factors: the UCMJ does not contemplate the issue of challenges after the number of members are reduced below quorum; Congress could not have intended to grant the accused only one challenge since the potential for addition of other members would have a "chilling effect" on the accused's exercise of his right to a peremptory challenge; and the changes to the UCMJ in 1968[11] demonstrate a congressional intent to give "military judges authority over the selection of court-martial members much like that which civilian judges have over the selection of jurors."[12] This analysis of the law is flawed in many respects.

A. Denial of Fair Trial

Both Chief Judge Everett in his lead opinion[13] and Judge Cox in his concurrence[14] suggest that the failure to grant additional peremptory challenges may result in a denial of the right to a trial by a fair and impartial fact finder, as guaranteed by the sixth amendment.[15] In doing so, they establish new precedent.

As Judge Cox correctly indicates, the Supreme Court has previously held that abuse or misuse of the peremptory challenge may be of constitutional concern.[16] In none of the cited cases, however, has the Supreme Court gone so far as to hold that limiting the *number* of peremptory challenges violates sixth amendment principles of fair trial.[17] In fact, the Federal Rules of Criminal Procedure[18] absolutely limit the number of peremptory challenges which a sole defendant may receive,[19] and provide for additional challenges only in the discretion of the judge. Neither the Supreme Court nor any of the circuit courts have found these rules to be an unconstitutional limitation on the right to a fair trail.

B. The UCMJ Does Not Contemplate the Issue.

The Chief Judge notes that no provision of the UCMJ specifically deals with the challenges after the detail of additional members and he correctly notes that the only reference to additional members is found in article 29.[20] He concludes that article 29 is inapposite, however, because that section only contemplates the reduction in the number of members *after* the beginning of testimony.[21] By narrowing the interpretation of article 29, he is free to conclude that Congress did not contemplate the addition of new members between the beginning of voir dire and the beginning of trial on the merits. Thus, the court is free to fill this void.

The Chief Judge, however, construes article 29 too narrowly. Article 29 provides that when new members are added to the court-martial, the trial is not to proceed until the evidence previously presented to the members is either read back to the court, a stipulation of that evidence is read to the court, or the evidence is presented anew.[22] Clearly, where members are excused as a result of challenges, either peremptory or for cause, there has yet to be any evidence presented to the court, except in the cases contemplated in article 29. If the convening authority details new members prior to the presentation of evidence on the merits, there is no evidence to be read back for the benefit of the new members. The provisions of articles 29 and 41 are completely compatible with one another, and the combination cannot

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[8] *Holley*, 17 M.J. at 365; *Carter*, 25 M.J. at 474–75.

[9] Judge Cox's opinion essentially agrees with that of Chief Judge Everett, however, Judge Cox would characterize the authority to grant additional challenges as permissive, to be used when necessary to ensure a "fair trial." 25 M.J. at 478.

Judge Sullivan concurred in the result, based upon his reading of United States v. Holley, in which he finds the military judge has a discretionary power to award additional peremptory challenges. 25 M.J. at 479. Judge Sullivan, however, chastises his brother judges for their "tortuous interpretation of Article 41 (b)." *Id.*

[10] 25 M.J. at 476.

[11] The Military Justice Act of 1968, Pub.L. 90–632, 82 Stat. 1335.

[12] *Carter*, 25 M.J. at 475.

[13] 25 M.J. at 476.

[14] 25 M.J. at 477–78.

[15] Const., amend. VI.

[16] 25 M.J. at 478, *citing* Batson v. Kentucky, 106 S.Ct. 1712, 1729 (1986) (Marshall, J., concurring); Swain v. Alabama, 380 U.S. 202 (1965) (misuse of peremptory challenges to exclude minorities from the jury); Frazier v. United States, 335 U.S. 497 (1948) (no error where jury venire consisted almost entirely of government workers, housewives, and unemployed persons; accused voluntarily used peremptory challenges to create a panel composed almost exclusively of government employees); United States v. Wood, 299 U.S. 123 (1936) government employees can be treated no differently than other citizens for determining challenges); Stilson v. United States, 250 U.S. 583 (1919) (the Constitution does not require the granting of peremptory challenges; all defendants can be required to exercise peremptory challenges jointly).

[17] *Batson*, 106 S.Ct. at 1720 ("the Constitution does not confer a right to peremptory challenges," citing *Swain*, 380 U.S. at 219, and *Stilson*, 250 U.S. at 586); *see also* United States v. Capua, 656 F.2d 1033, 1038 (5th Cir. 1981) (although peremptory challenges implement the right to a fair and impartial jury, they are not an inherent part of the sixth amendment).

[18] Fed. R. Crim. P. 24.

[19] United States v. Wilson, 571 F. Supp. 1422, 1429 (S.D.N.Y. 1983), *aff'd*, 750 F. 2d 7 (2d Cir. 1984), *cert. denied*, 107 S.Ct. 143 (1986).

[20] *Id.* at 474; *see also* UCMJ, art. 29(b) (continuation of trial after additional members are detailed).

[21] 25 M.J. at 474.

[22] USMJ, art. 29.

be said to indicate that Congress failed to anticipate the situation presented in *Carter*.[23]

C. Chilling Effect on Election

The second basis of Chief Judge Everett's analysis, that Congress could not have intended to limit the accused to one peremptory challenge because of the "chilling effect" it would have on his right to exercise that challenge, is presented without any supporting authority. In it, the Chief Judge reasons that, where the number of members rests at five, with only the accused's peremptory challenge remaining to be decided, the accused is between Scylla and Charybdis: if he uses his challenge "he will be exchanging a 'known evil' for a possibly much worse 'unknown evil.' "[24]

It is a compelling emotional argument, but its logic fails. In reality the accused will always face such a choice.[25] Only if taken to the extreme, where the accused is given a number of peremptory challenges equal to the number of additional members detailed, does the accused not face such a predicament. At any number of challenges less than that, he is faced with the reality that the number of available personnel is greater than his ability to challenge them and that, at some time, he must make the inevitable, difficult choice between the known and the unknown.

The logic also fails because there is no certainty that the number of members will be reduced to five in all cases. Certainly, when the number is larger than five, there is no constitutional impediment to forcing the accused to elect how to use his challenges without any certainty as to whether the choice is optimal.[26] The very concept of a peremptory challenge is that there is no certainty that the challenged venireman will be opposed to the challenger's position. Where the certainty exists, the challenge for cause is an appropriate remedy.

D. Authority Over Selection of the Members

The Chief Judge's final analytical basis is perhaps the most troubling. He construes the 1968 amendments to the UCMJ as demonstrating a congressional intent to give military judges the "authority over the selection of court-martial members much like that which civilian judges have over selection of jurors."[27] The Chief Judge's analysis fails because the comparison which he seeks simply cannot be made.

In the federal judicial system, it is the responsibility of the district court to assemble the venire from which the jury is selected.[28] The district court is also responsible for the determination of challenges, both peremptory and for cause.[29] In the military, these two responsibilities are split between the convening authority, who is responsible for the members, and the military judge, who is responsible for determining challenges.[30] The existence of this dichotomy, which Congress perpetuated in the Military Justice Act of 1968, is fatal to the Chief Judge's argument.

The Chief Judge further argues that the power that Congress intended to give military judges was the power by which federal district court judges may grant additional peremptory challenges to criminal defendants. The authority for district court judges, however, is explicit in the Federal Rules of Criminal Procedure and is limited to cases involving multiple defendants.[31]

United States v. Blanton,[32] which the Chief Judge cites as support, is an example of the operation of the discretionary power of the federal judge in a multiple defendant case. In that case, the three codefendants were entitled to ten challenges. The defendants requested, and the judge granted, an additional twenty challenges. The result was that *each* defendant was allowed to exercise ten challenges.[33] Although the defendants were not "entitled" to the twenty additional

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[23] It is noteworthy that article 29 specifies the evidence to be read into the record is that which has been "presented to the members." Thus, for article 29 purposes, the situation in *Holley*, where the members had been sworn, challenges exercised, and evidence presented, before a seven-month hiatus caused by the accused's mental condition required the reading back of evidence, is not distinguishable from that of *Carter*, where no evidence was presented and, therefore, there was no evidence to read back. The similarity extends to article 41 as well; in both cases the accused has the opportunity to challenge the new members for cause. *Compare* 17 M.J. 363–64, *with* 25 M.J. at 473.

[24] 25 M.J. at 475.

[25] *See, e.g.*, United States v. Springfield, 829 F.2d 860, 863–64 (9th Cir. 1987) (cited by Chief Judge Everett, 25 M.J. at 475). In *Springfield*, the accused had exhausted all ten challenges to which he was entitled, yet only eleven jurors had been selected. The court then obtained an additional prospective juror, who had not been a member of the original pool. The accused requested an additional challenge against this juror. The court refused the request, but allowed the accused to rescind an earlier challenge, and exercise that challenge against the additional prospective juror instead. The Ninth Circuit noted: "He contends that he was 'faced with the choice of accepting the new juror, who was undesirable, or replacing her with a person he had already determined was unacceptable.' This situation may be unfortunate, but it is no different from the one Springfield would have been in if a sufficient number of jurors had been called in the first place." 829 F.2d at 863.

[26] *Id.*

[27] 25 M.J. at 475.

[28] *See, generally*, 28 U.S.C. §§ 1861–71 (1982).

[29] *Id.*; Fed. R. Crim. P. 24; United States v. Morris, 623 F.2d 145, 151 (10th Cir.), *cert. denied*, 449 U.S. 1065 (1980) (Fed. R. Crim. P. 24 establishes the number of challenges, but the district court is free to develop procedures for their exercise).

[30] 25 M.J. 475–76.

[31] Fed. R. Crim. P. 24(b) ("If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly"); *see also* United States v. Springfield, 829 F.2d 860, 863–64 (9th Cir. 1987). *Springfield*, cited as authority in the Chief Judge's opinion is contrary to the proposition for which it is cited. In that case, the court refused to grant additional challenges and the court noted that permissive authority for granting additional challenges has only been applied to multi-defendant cases. 829 F.2d at 863.

[32] 719 F.2d 815 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984); *see also* United States v. Vera, 701 U.S. 1349, 1356 (11th Cir. 1983) (claimed error in denying challenge for cause was harmless because the judge granted the codefendants a total of twelve peremptory challenges, two more than the number to which they were entitled).

[33] *Id.* at 828.

challenges as a matter of right, there was clear authority for the judge's action in Rule 24.[34]

No similar authority is found in the military rules. Additionally, *Carter* did not involve the joint trial of co-defendants. It is, in fact, this distinctive language in Rule 24 which lead the *Holley* court to conclude that Congress did not manifest an intent to incorporate the same guarantees in the military practice.

This final argument also fails for lack of support in the legislative history of the Military Justice Act of 1968.[35] The history demonstrates a congressional intent to transfer certain functions, previously administered by the president of the court-martial or by vote of the members, to the military judge. The result was recognized as giving the "law officer" responsibilities similar to those of judges, rather than merely advising the members of the court. This is not to say that Congress intended that procedures written expressly for jury trials in federal district courts were to be applied to the courts-martial. Congress simply never manifested the intent which the Chief Judge implies.

Application of *Carter*

Application of the *Carter* decision poses four distinct problems: when is the accused entitled to additional challenges, to how many challenges is he entitled, against whom may the challenges be exercised, and what is the role of the convening authority, *vis a vis* the military judge, in "selecting" the court members?

The court makes no effort to analyze the question of when an accused becomes "entitled" to additional peremptory challenges. Chief Judge Everett believes that any time additional members are detailed to the court after the accused has exercised his initial peremptory challenge, the accused is entitled to an additional challenge. Judge Cox would hold that the military judge may grant additional challenges where necessary to a "fair trial," implying that the accused becomes entitled to additional challenges when the constitutional principles of fair trial would so require.[36] Judge Sullivan apparently would never find the accused to be entitled to additional challenges, but would give the military judge discretion to grant additional peremptory challenges when additional members are detailed.[37]

Clearly, as a result of the *Carter* decision, the military judge must grant another peremptory challenge when additional members are detailed after the accused exercises his primary peremptory challenge. If this were the extent of the opinion, little problem would exist—simply detailing larger court-martial panels would limit the application of the rule. But the opinions of the Chief Judge and Judge Cox imply that the military judge is always free to award the defense additional peremptory challenges.[38] Thus, military judges are free, apparently, to fix the number of peremptory challenges which they will grant to the defense in any particular case.[39] This would grant the military judge more discretion than federal district court judges now possess under Rule 24.

A closely related question is also presented by the *Carter* opinion: how many additional peremptory challenges may the military judge grant an accused? Again the opinion offers no answers.

Unlike the federal system, where the court begins with a large pool from which twelve jurors are selected, the military justice system assigns no fixed number to the size of the panel. The difference is significant. In the civilian system the size of the jury venire can be adjusted according to the number of challenges. The greater the number of potential challenges the larger the venire. In the end, however, no more than twelve persons will sit as the jury. The need for alternate jurors is also anticipated, and the venire can be adjusted accordingly to ensure that the increased size of the panel will be met. In contrast the court-martial panel is not limited to a set number, however, and all who are not challenged remain members of the court.

The net result is that the convening authority must have some idea as to how many challenges will be granted prior to detailing the members—if too few members are detailed, the quorum will not be met; too many and the size of the court becomes burdensome, both as to the proceedings and the effect on the command's mission.

If the accused is to receive additional peremptory challenges, how may the additional challenges be exercised? If the additional challenge is granted because new members are added, there would seem to be no impediment to exercising the challenge against members of the original panel. In such a case, the accused would gain additional rights that he would not have had if the original panel had met the quorum. Again, this would give the military accused a more expansive right than is enjoyed by defendants in federal district court.[40]

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[34] *See, supra,* notes 30–32 and accompanying text.

[35] *Hearings on H.R. 12705 Before Subcomm. No. 1 of the House Comm. on Armed Services,* 90th Cong., 1st Sess. 8313, 8319 (1967) (Statements of the Honorable Charles E. Bennett, Representative from the State of Florida, and Major General Kenneth J. Hodson, Judge Advocate General, U.S. Army); H.R. Rep. 1481, 90th Cong., 2d Sess. 6–9 (1968); S. Rep. 1601, 90th Cong., 2d Sess. 3, 9–11 (1968).

[36] 25 M.J. at 478; *but see* United States v. Capua, 656 F.2d 1033 (5th Cir. 1981) (peremptory challenges and the provisions of the Federal Rules of Criminal Procedure, fixing the number of peremptory challenges are not inherent components of the sixth amendment right to a trial by a fair and impartial jury). Although Judge Cox never specifically finds an "entitlement," such a right must be implied from his reliance on constitutional principles of fair trial. If to deny the request for additional peremptory challenges would make the trial unfair, in the constitutional sense, then certainly the accused must be "entitled" to those additional challenges.

[37] 25 M.J. at 479.

[38] 25 M.J. at 476 (Everett, C.J.) ("regardless of the provisions of Article 41, a military judge has a *duty* to grant additional peremptory challenges if he determines that this is necessary to assure a fair trial"); *Id.* at 477–78 (Cox, J., concurring) (abuse or misuse of peremptory challenges is of constitutional concern).

[39] If the object of granting the additional challenges when new members are detailed is to ensure a fair trial, then should not additional challenges be granted whenever the military judge, in his discretion, believes that the trial would be "unfair" without the additional challenges? Ergo, as long as the military judge is willing to state on the record that he believes the additional challenges to be necessary to a fair trial, he has the authority to proceed.

[40] See, *supra,* note 30.

The final question is the most problematic: what is the role of the convening authority, *vis a vis* the military judge, in "selecting" the court-martial panel? Chief Judge Everett states that implicit in the Military Justice Act of 1968 is a Congressional intent that military judges have authority over the "selection" of court-martial members.[41] He and Judge Cox argue that such authority is a necessary check on the potential that a convening authority may "stack" the court by detailing prosecution-oriented members.[42]

Assuming that the convening authority were to "stack" the court-martial panel solely with persons bent on conviction,[43] the court's remedy is quixotic. The granting of additional peremptory challenges would only result in the detail of additional members of like mind to the one challenged.

Taken in the broadest sense, Chief Judge Everett's opinion suggests that the military judge has the power to determine the appropriateness of the convening authority's decision, by virtue of his "authority over selection of the court-martial members." Such a power, separate and apart from determining whether the convening authority properly applied article 25, would amount to a veto power over the convening authority's selection, and clearly contravene the intent of Congress as expressed in article 25.

Conclusion

The Court of Military Appeals' decision in *United States v. Carter* has created as many problems as it sought to cure. Perhaps the only realistic solution is an old one: eliminate peremptory challenges in courts-martial.[44]

In civilian courts the peremptory challenge is inextricably linked to the concepts of unanimous verdict and retrial if the jury fails to reach a verdict. In principle, the peremptory challenge allows each side to eliminate those persons whom the party believes, but is indisposed to prove, will vote against his view.[45] Even in civilian courts, however, the efficacy of peremptory challenges has been questioned.[46]

In the military, with nonunanimous verdicts and no possibility of a "hung" jury, the need for peremptory challenges is less apparent. The government need only gain the necessary two-thirds majority to convict; the accused need gain one member more than one-third to acquit. The court panel cannot result in a "hung jury." Accordingly, requiring both the accused and the government to show cause for challenges would not significantly change the balance—in the court-martial either side can afford to concede some votes. In the final analysis, perhaps *Carter* will be the necessary catalyst for legislative abolition of the peremptory challenge from the military justice system.

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[41] 25 M.J. at 475.

[42] 25 M.J. at 475 n.9 (C.J. Everett); *Id.* at 478 (J. Cox, concurring) ("The Government has the functional equivalent of an unlimited number of peremptory challenges. . . . The statutory authority to choose the members necessarily includes the corollary right not to choose").

[43] It is difficult to imagine that convening authorities know the officers in their command well enough to predict how they will vote in a given case that is referred to trial. Certainly, the convening authority in *Carter* either was not capable of such ability or voluntarily chose not to exercise it. 25 M.J. at 478 (Cox, J., concurring) ("[I]n this case it was the use of the peremptory challenge by trial counsel that put the defense in the position of having to breach the quorum if it was to exercise its peremptory challenge").

[44] Peremptory challenges did not exist in Army courts-martial prior to 1920 or in Navy courts-martial prior to 1949. *Uniform Code of Military Justice (No. 37): Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 1027 (1949); S. Rep. 486, 81st Cong., 1st Sess. 18 (1949); H.R. Rep. 491, 81st Cong. 1st Sess. 22 (1949).

[45] *See* Batson, v. Kentucky, 106 S. Ct. 1712, 1735–36 (1986) (Stevens, J., concurring) (citing Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545, 553–54 (1975).

[46] *Batson,* 106 S. Ct. at 1729 (Marshall, J., concurring) (suggesting that elimination of peremptory challenges is the only effective means of preventing their use for discriminatory purposes by either the prosecution or defense).

Preliminary Case Diagnosis by Counsel [A Cookbook Approach for Juris Doctors]

Colonel John F. Naughton
Circuit Judge, Third Judicial Circuit, Fort Sill, OK

The Chief of Criminal Law or the Senior Defense Counsel drops a new case file on your desk. What do you do next, Doctor? Start interviewing witnesses. Do some computer research. Call the accused over to the TDS Office to discuss his case. Stop! You're getting ahead of yourself. What kind of a case is this? Do you have a plan? Have you tried a case like this before or recently?

The Recipe

What I suggest is nothing new or innovative. Just develop a consistent approach to case diagnosis. This approach concentrates on issue identification. The effort should flag the vital signs of any obvious—and sometimes not so obvious—substantive, procedural, and evidentiary issues that may be lurking in a new case. Once you develop a good basic diagnostic approach, you may tailor the method to suit your own tastes. Even if you devote as little as an hour to this process, it will save you valuable time. You can then concentrate your trial preparation efforts rather than diluting them with a shotgun approach.

The Ingredients

A physician will normally make a preliminary diagnosis of his patient's condition before ordering costly lab tests. As a Juris Doctor, you should have a similar approach. Before reading over a new case file, gather together within easy reach the following references: the Manual for Courts-Martial,[1] the Crimes and Defenses Deskbook,[2] the Trial Procedure Pamphlet,[3] the Military Evidence Pamphlet,[4] the Military Judges' Benchbook,[5] and the Trial and Defense Counsel Handbook.[6] This basic load of references should also be at counsel table when you appear in court.

Keep in Mind That Reference Materials are Perishable. Shepardizing Case Cites is an Absolute Must, and More Detailed Research is Usually Required as Trial Preparation Proceeds.

I am going to use a fraternization case and a child abuse case to illustrate some potential issues. To appreciate the flavor of the diagnostic method, you should refer to the footnoted references as you read through the case file examples.

I trust that spotting obvious issues, such as anticipating a suppression motion where the file contains a confession or a search authorization, won't need further elaboration. Your case file will normally contain a charge sheet, convening order, witness statements, and possibly an MP or CID report. So, what can we learn from this file? Quite a lot, I suggest.

The Diagnosis

When you open your case file the first document you usually see is the charge sheet. What does it tell you? First it shows that a married male Sergeant is facing charges of dereliction of duty,[7] consensual sodomy,[8] adultery,[9] and fraternization with a female trainee.[10]

Next, does each specification state an offense? Compare each with the model specifications in your Manual[11] or Benchbook.[12] If you find an omission, or some innovative draftsmanship, note that for later research.[13]

Now, before reading the rest of the case file, review the charges and your Crimes and Defenses Deskbook.[14] The main purpose here is to refresh your memory on substantive law. See anything interesting? For instance, does the offense of fraternization under article 134 apply to a

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[1] Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

[2] The Judge Advocate General's School, U.S. Army, Criminal Law Deskbook—Nonjudicial Punishment, Crimes & Defenses, Confinement & Corrections (Aug. 1985) [hereinafter Crimes and Defenses Deskbook].

[3] Dep't of Army, Pam. No. 27-173, Legal Services—Trial Procedure (15 Feb. 1987) [hereinafter Trial Procedure Pamphlet].

[4] Dep't of Army, Pam. No. 27-22, Legal Services—Military Criminal Law Evidence (15 Jul. 1987) [hereinafter Military Evidence Pamphlet]. Two other excellent references that you should have ready access to are: S. Saltzburg, L. Schinasi, and D. Schlueter, Military Rules of Evidence Manual (2d ed. 1986) and E. Imwinkelried, P. Giannelli, F. Gilligan, and F. Lederer, Criminal Evidence (1979).

[5] Dep't of Army, Pam. No. 27-9, Military Judges' Benchbook (1 May 1982) (C2, 15 Oct. 1986) [hereinafter Benchbook].

[6] Dep't of Army, Pam. No. 27-10, Military Justice Handbook for the Trial Counsel and the Defense Counsel (1 Oct. 1982) (C1, 1 Mar. 1983) [hereinafter Military Justice Handbook].

[7] Uniform Code of Military Justice art. 92, 10 U.S.C. 892 (1982 & Supp. III 1985) [hereinafter UCMJ].

[8] UCMJ art. 125.

[9] UCMJ art. 134.

[10] *Id.*

[11] MCM, 1984, Part IV, paras. 16f(4), 51f, 62f, and 83f.

[12] Benchbook, paras. 3-30a, 3-98a, 3-127a, and 3-152.1a.

[13] *See* Trial Procedure Pamphlet, paras. 7-5 and 19-7.

[14] Crimes and Defenses Deskbook at 2-24 thru -28, 2-35, 2-36, and 2-83.

NCO?[15] Note also that the deskbook sometimes contains more than just a discussion of substantive crimes and defenses. For example, the discussion on sodomy also highlights an important evidentiary and instructional issue. An accomplice instruction is appropriate when the victim voluntarily participates in the offense.[16] Remember, we are dealing with consensual sodomy. Awareness of the accomplice issue may dictate how you conduct your interview of the female soldier or question her at trial. From the defense perspective, attacking the credibility of this witness could be critical.[17] As trial counsel, consider how best to maintain and, if necessary, restore the credibility of such a key witness.[18]

Now, using your Manual or Benchbook, draw up a proof analysis worksheet.[19] You may also wish to have ready at hand a copy of the Benchbook instructions checklist.[20] This list provides a good memory jogger for potential issues. OK, let's get started. How will the government prove its case? What evidence is available? Reading the remainder of the case file should provide you with most, but probably not all, of the answers to completing the worksheet. Now, try some mental gymnastics by anticipating how you would defend or prosecute this case. Look for weaknesses in the case and try to identify potential defenses. Here are some other issues that might be worth noting for future research. If the government attempts to call the accused's wife as a witness, is there a marital privilege problem?[21] If a valid privilege is asserted, is the wife "unavailable" for residual hearsay purposes?[22] Are there any Mil. R. Evid. 412 issues associated with the testimony of the female soldier?[23]

Your proof analysis worksheet will also come in handy as an elements checklist during the trial when you [trial counsel] are deciding whether or not to rest your case, or whether you [defense counsel] should make a motion for a finding of not guilty because of a failure of proof.[24]

Now, let us take a quick look at a child abuse case file. In this example, a soldier faces a charge of intentionally inflicting grievous bodily harm on her four-year-old daughter. Remember to follow the diagnostic method discussed above. This type of case usually contains a host of potential evidentiary problems. Issues which are likely to surface upon reviewing the file may, at a minimum, include: proving specific intent,[25] defense of accident,[26] competency of young victim to testify,[27] expert testimony,[28] battered child syndrome evidence,[29] excited utterance,[30] medical treatment statements,[31] confrontation and unavailability,[32] and using evidence of prior injuries [uncharged misconduct] to prove the specific intent element and/or to rebut the defense of accident.[33]

Use the Military Evidence Pamphlet to familiarize yourself with these issues. In the typical child abuse case, the victim has been abused on more than one occasion. Moreover, the charged offense most often occurs in the privacy of the home against an essentially nonverbal child, making the availability of direct evidence very rare. Thus, the government must prove its case with circumstantial evidence amidst a background pattern of abuse. Consequently, the government's use of hearsay exception evidence and/or evidence of uncharged misconduct can be decisive.[34] Your basic research here should give you a good grasp of the law governing such issues. If further research is necessary, the Military Evidence Pamphlet will also give you many sources to cases, texts, and articles.

You may also face some interesting practical and procedural issues in a child abuse case, such as, how to handle

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[15] *Id.* at 2–26. Recall that I said reference materials are perishable. On the issue of whether a NCO can be charged with fraternization under article 134, the Crimes and Defenses Deskbook at 2–26 refers to the case of United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984) and indicates that the offense of fraternization in the MCM, 1984 does not apply to senior enlisted persons. By shepardizing *Stocken*, you would find that the Army Court of Military Review recently held otherwise. *See* United States v. Clarke, 25 M.J. 631 (A.C.M.R. 1987).

[16] Crimes and Defenses Deskbook at 2–35. *See* Trial Procedure Pamphlet, paras. 22–15b(2)(e) and 22–15b(3)(d); Benchbook, para. 7–10.

[17] *See* Military Evidence Pamphlet, paras. 7–3 and 7–4.

[18] *See* Military Evidence Pamphlet, paras. 7–2 and 7–5.

[19] Military Justice Handbook at 3–63. The elements of the offenses are found in either the MCM, 1984, Part IV, paras. 16b, 51b, 62b, and 83b, or the Benchbook, paras. 3–30b, 3–98b, 3–127b, and 3–152.1b.

[20] Benchbook, Appendix A.

[21] MCM, 1984 Mil. R. Evid. 504 [hereinafter Mil. R. Evid. 504]. *See* Military Evidence Pamphlet, para. 5–2d(1).

[22] Mil. R. Evid. 804a(1). *See* Military Evidence Pamphlet, paras. 17–8b(3) and 33–3c(2).

[23] Mil. R. Evid. 412. *See* Military Evidence Pamphlet, paras. 7–4b, and 14–1 thru –7.

[24] *See* Trial Procedure Pamphlet, para. 22–12.

[25] MCM, 1984, Part IV, para. 54c(4)(b)(ii). *See* Benchbook, para. 7–3, Note 2.

[26] *See* Crimes and Defenses Deskbook at 4–2 to 3; Benchbook, para. 5–4.

[27] *See* Military Evidence Pamphlet, paras. 5–1, 5–2c, and 7–4e.

[28] Mil. R. Evid. 702–704 and 803(4).

[29] *Id. See* Military Evidence Pamphlet, paras. 6–5c, note 70 and accompanying text, and para. 7–5f.

[30] Mil. R. Evid. 803(2). *See* Military Evidence Pamphlet, paras. 7–2 and 17–7.

[31] Mil. R. Evid. 803(4).

[32] *See* Military Evidence Pamphlet, paras. 33–1 thru –4.

[33] Mil. R. Evid. 404(b). *See* Military Evidence Pamphlet, paras. 13–2e(4) and 13–2e(7). A thorough understanding of Mil. R. Evid. 403 and the application of its balancing test to uncharged misconduct issues is imperative. *See generally* Military Evidence Pamphlet, ch. 12.

[34] A good working knowledge of how to prepare and respond to a motion *in limine* regarding such evidence is essential. *See* Military Evidence Pamphlet, paras. 4–2b, 7–6, and 13–3a; Trial Procedure Pamphlet, para. 19–8g.

the use of a video taped deposition of the victim,[35] or excluding spectators from the courtroom if the victim cannot testify before an audience.[36]

The Prognosis

The key to success in the courtroom is sound pretrial preparation. After properly diagnosing a new case file, you will have a fairly good grasp of the substantive law, and the potential evidentiary and procedural issues. Now you have a basis for investigating your case. Don't just charge off looking for an irrelevant windmill to tilt at. Diagnose your case, check your references, draw up a good plan, and then focus your investigative efforts.

Best wishes, Doctor, you are now ready to get your new case in shape for trial.

[35] *See* Trial Procedure Pamphlet, para. 13–2.

[36] *See* Trial Procedure Pamphlet, para. 6–1b.

Military Rule of Evidence 313(b)

Major William L. Wallis
Military Judge, 3d Judicial Circuit, Fort Carson, Colorado

Introduction

The authority to inspect the soldier and his equipment has long been recognized as an inherent power of command. Traditionally, the commander could conduct a health and welfare inspection or "shakedown" of his unit and use any evidence obtained therefrom in a court-martial, provided that the inspection did not become a search. The difference between a valid inspection and a search was not always easy to discern; nevertheless, the general distinction was whether the commander was "just looking" (inspection) or whether he was looking for something specific (search). As one court put it, is the commander's purpose to "look for" something or merely to "look at" the unit.[1] If the commander was just looking to evaluate the readiness or welfare of his unit and stumbled onto contraband, then the plain view doctrine allowed that illegal item to be seized and admitted in court. On the other hand, if the commander was looking for drugs or weapons, or was looking in places where only contraband could be secreted, then this inspection would be characterized as a search and the rules of search and seizure would be applied.[2]

The law surrounding military inspections was thrown into a flux in the late 1970s.[3] Two Court of Military Appeals cases, *United States v. Thomas*[4] and *United States v. Roberts*,[5] cast serious doubt upon the validity of the traditional military evidence rules in this area. As a result of the decisions in these cases, when the Military Rules of Evidence were implemented in 1980, a rule of evidence for inspections was inserted, which attempted to mark out a safe passage through the mine field erected by *Thomas* and *Roberts*.[6] In 1981, after a change in court personnel, the Court of Military Appeals reversed itself and ruled that inspections which were conducted in a reasonable manner and which were not a subterfuge for a search were permissible and any evidence obtained during the inspection was admissible.[7] With this backdrop, the current Military Rule of Evidence 313(b) was amended in 1984 to reflect a position consistent with the traditional view of a military inspection.[8] The purpose of this article is to analyze the current Military Rule of Evidence 313(b) with specific attention to some recent case law.

The Components of Military Rule of Evidence 313(b)

Military Rule of Evidence 313 covers both inspections and inventories. Part (a) of the rule states that evidence obtained from either a valid inspection or inventory, as defined by the rule, is admissible in a court-martial. Part (b) deals with inspections, while part (c) discusses inventories. Under the rule, the words "inspection" and "examination" have precise meanings that this article will attempt to apply with consistency. "Examination" refers to the process by which the commander or his designee "looks" at the unit. An "inspection" is an examination which comports with

[1] United States v. Goldfinch, 41 C.M.R. 500, 507–508 (A.C.M.R. 1969).

[2] *See generally* United States v. Lange, 28 C.M.R. 172 (C.M.A. 1959); United States v. Hay, 3 M.J. 654 (A.C.M.R. 1977); and United States v. Tates, 50 C.M.R. 504 (A.C.M.R. 1975).

[3] *See*, Dep't of Army, Pam. 27–22, Military Criminal Law Evidence, 159–160 (15 July 1987) (hereinafter DA Pam. 27–22).

[4] 1 M.J. 397 (C.M.A. 1976). *Thomas* involved a health and welfare inspection in which a marihuana dog was used to alert on lockers, which were subsequently searched. While the three COMA judges all agreed that the fruits of this inspection were inadmissible, they gave three different reasons for this conclusion. Judge Cook found insufficient information for the commander to authorize this locker search; Chief Judge Fletcher opined that because of past abuses, the fruits of any inspection should be excluded; and Judge Ferguson reasoned that using marihuana dog transforms an inspection into a search.

[5] 2 M.J. 31 (C.M.A. 1976) *Roberts* involved a shakedown inspection in which a marihuana dog was used to alert on lockers that would be subsequently searched for drugs. Judge Perry found that this inspection was really a search. Chief Judge Fletcher concurred, citing his opinion in *Thomas*, while Judge Cook dissented, finding this was valid exercise of a commander's authority to rid his unit of a dangerous condition (the presence of drugs).

[6] *Supra* note 3.

[7] United States v. Middleton, 10 M.J. 123 (C.M.A. 1981).

[8] *Supra* note 3.

the rule's requirements and is therefore valid in the sense that any fruits gained from it are admissible evidence.

The rule begins by defining the boundaries of an inspection. An inspection may cover all or part of a unit and its equipment, and is directed at measuring and verifying any and all aspects of unit readiness. The basic thrust of the rule is that an examination qualifies as an inspection if its primary purpose is a proper one; that is, if its purpose is consistent with the traditional use of a military inspection; ascertaining the unit's condition. Where the primary purpose of an examination is "to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, vessel, aircraft, or vehicle,"[9] it qualifies as an inspection. On the other hand, if the examination has the primary purpose of "obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings"[10] then it does not qualify as an inspection. Furthermore, an examination can still be an inspection even when it is directed at locating and confiscating "unlawful weapons and other contraband."[11] Thus, the key ingredient of this rule is not what you are looking for, but why you are looking.

The rule has two other aspects which merit comment at this time. Language was added to the rule in the 1984 amendment to encompass the production of bodily fluids, specifically urine. The rule also identifies certain situations in which there is a presumption that an inspection is really a subterfuge for a search. These situations, which will be discussed later in this article, imposes a higher standard on the prosecution to demonstrate a valid purpose for the examination.

Multiple Purposes

Determining the commander's purpose for ordering the examination is not always a simple task. The trial may occur several months after the examination; the commander will seldom memorialize his thoughts at the time he acts; and the commander usually has more than one reason for directing the examination. The case of *United States v. Austin*[12] illustrates the difficulty which arises when the commander has several purposes for ordering the inspection.

In *Austin*, the unit commander was asked what his primary purpose was for scheduling the urinalysis. He gave, in order, the following three reasons: (1) to find users and initiate disciplinary proceedings against them; (2) to comply with the requirement for a yearly unit urinalysis; and (3) to ensure safety within his unit. During cross-examination, he reiterated this answer. The military judge placed great significance on the order in which the commander articulated his reasons and suppressed the evidence. The military judge concluded that the first reason articulated must have been the commander's foremost concern and therefore the primary purpose for the examination. The case went to the Army Court of Military Review on a government appeal. In reviewing the trial judge's decision, the court stated: "Whether the primary purpose of the inspection was aimed at legitimate administrative concerns versus implemented with a view toward discovering evidence to be used in a disciplinary proceeding is a factual question to be determined by the military judge."[13] The court then went on to say that under the standard of review applicable to this type of case, the trial judge's findings were not clearly erroneous and therefore must be sustained.

As *Austin* indicates, the judge's findings of fact will normally control, unless the findings are clearly unsupported by the evidence. In *United States v. Rodriquez*,[14] the Army Court of Military Review held that the judge erred by entering a factual finding which amounted to an erroneous statement of the law.

Rodriguez involved the admissibility of a unit urinalysis. Testimony by the commander indicated that the urinalysis was conducted in order to implement the Army's policy of controlling drug abuse, to comport with the regulation requiring an annual test, and to take some type of disciplinary action against anyone testing positive. In ruling to suppress the results of this test, the military judge concluded:

> A urinalysis . . . is a unique type of inspection. The only thing that it is looking for is drug abuse. And, once such an inspection is ordered with the predetermined notion that disciplinary action will be taken . . . that makes the primary purpose the obtaining of evidence for disciplinary action or court-martial; and therefore it is not an inspection.[15]

The military judge went on to say that, in order for the urinalysis to be an inspection, the commander must be willing to take only administrative action against those testing positive.

In reversing the judge's ruling on government appeal, the Army Court of Military Review equated the judge's ruling to a finding of law that whenever a commander contemplates taking disciplinary action, the examination is converted into a search, regardless of any other valid purposes. The court hinted that had the judge simply held that the primary purpose was an improper one, then, even though the court believed the facts showed otherwise, this factual finding would probably have been upheld since some evidence existed to support such a finding. The *Rodriguez* court went on to explain why the judge's reasoning was faulty:

> Few command actions are taken for exclusively one purpose. The evil to which the evidentiary rule is directed is an examination conducted for the primary purpose of securing evidence for use in disciplinary proceedings. Here the most that can be said is that the battalion commander had multiple purposes when he ordered the urinalysis testing . . .

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[9] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 313(b) [hereinafter Mil. R. Evid. 313(b)].

[10] *Id.*

[11] *Id.*

[12] 21 M.J. 592 (A.C.M.R. 1985).

[13] *Id.* at 595.

[14] 23 M.J. 896 (A.C.M.R. 1987).

[15] *Id.* at 898.

> [M]ixed purposes are not prohibited by Military Rule of Evidence 313(b). Mixed purposes are clearly recognized through the use of the primary purpose language. No particular purpose is automatically the primary purpose when several purposes are involved. The goal of a suppression hearing is to determine which purpose is, in fact, the primary purpose; not to apply a *per se* rule which is outcome determinative and excludes properly admitted evidence that should be considered in the primary purpose analysis. [16]

The court explained that examinations directed at preventing and correcting adverse conditions in a unit, such as drug abuse, can be inspections; such examinations enable a unit to maintain its readiness and, therefore, are within the definition of a valid inspection under Military Rule of Evidence 313(b).

Can *Austin* and *Rodriguez* be harmonized? Under very similar facts, two different panels of the Army Court of Military Review reached opposite results. In both cases, the commander gave several reasons for ordering the urinalysis and the trial judge found an improper primary purpose. Perhaps the cases are consistent in that the trial judge in *Rodriguez* went too far and made, as the court held, a finding of fact that had the effect of becoming an erroneous conclusion of law. On the other hand, *Rodriguez* could be a situation in which the appellate court disagreed with the military judge's factual findings but, because of the constraints which exist on review of a government appeal, had to couch its disagreement in terms of an erroneous application of law. But no matter how these cases are viewed, the lesson is clear: The military judge must be careful to articulate his factual findings so that his conclusions about the commander's primary purpose are clear and fully supported by the evidence.

In comparing *Austin* with *Rodriguez*, two other interesting issues are raised: What happens when the commander articulates dual or mixed purposes, one of which is to obtain evidence for use in a court-martial, and the military judge is unable to segregate at a single primary purpose? What if the commander states that his primary purpose is to identify users and take either disciplinary *or administrative* action against them?

It would not be unusual for a commander to testify that he or she had several reasons for ordering the examination, and be unable to identify a single primary purpose. Assuming one of the reasons is to obtain evidence for use in a court-martial, how should this case be resolved? The military judge could rely on other existing facts and circumstances and make a factual finding which identifies a primary purpose. Assuming this is not the case, however, how should the military judge rule? Has the government met its burden if it demonstrates that obtaining evidence for use in a court-martial was not the commander's primary purpose; or must the government show that the primary purpose was a proper one?

The plain language of the rule does not resolve this question. The rule merely says that an examination with a proper primary purpose as defined by the rule is a valid inspection, whereas an examination with an improper primary purpose is not a valid inspection. *In United States v. Barnett*, [17] an inventory case under Military Rule of Evidence 313(c), the commander of a soldier placed in pretrial confinement ordered an inventory of that soldier's property as required by regulation and notified the CID so they could be present during the inventory in order to obtain additional evidence in the ongoing investigation against the soldier. The trial court found that the commander's primary purpose was to comply with the regulations, and his secondary purpose was to gain evidence for a court-martial. In deciding this case, the Court of Military Appeals was required to interpret the improper purpose language of Military Rule of Evidence 313(c), which is identical to the language in 313(b). The court held that this language "contains a negative implication that, if the examiner's purpose to obtain evidence is not 'primary,' the inventory is untainted." [18] The court went on to say that the drafter's analysis of the rule supports this conclusion. If this means that a demonstration of the *absence* of an improper primary purpose satisfies the rule, then such a finding allows the fruits of that examination to be admissible. Of course *Barnett's* value in this discussion may be limited in that a proper primary purpose was found to exist in that case. Whether the improper purpose language would be construed differently when no primary purpose was found to exist is unclear. Arguably, a court's inability to find a "proper" purpose need not result in a finding that the examination was unlawful, because the object of the rule is to weed out the subterfuge searches. The rule can be read to proscribe only examinations that are subterfuges for an unlawful search without requiring that the examination also have an identifiable primary purpose that is a proper one.

What happens if the military judge finds that several reasons existed for the examination but no single reason is dominant? Could the judge properly conclude that if the majority of the reasons are proper ones, then the primary purpose is valid under the rule? May the rule be interpreted on a percentage basis; that is, where no reason is dominant, does the examination have a proper primary purpose if more than fifty percent of the reasons given are proper? While support for this bizarre analytical approach is found neither in the literal language of the rule nor in the analysis, it is consistent with the concept of qualifying an examination as an inspection unless it is a subterfuge for a search. Thus, if the majority of the reasons for an examination are administrative reasons, then the examination is not a subterfuge for a search even though one of the reasons for the examination is to discover evidence for use in a court-martial.

If the commander testifies that his primary purpose was to take action against anyone testing positive, is this an improper primary purpose if administrative action is one of the contemplated responses? In *Austin*, the military judge stated that the commander's primary purpose included taking "some sort of dispositive action with regard to those individuals, whether that be punitive action or whether it be

[16] *Id.* at 898–99.

[17] 18 M.J. 166 (C.M.A. 1984).

[18] *Id.* at 169.

adverse administrative action."[19] The judge then went on to conclude this was an improper primary purpose. In *Rodriguez*, the military judge opined "if it's going to be an inspection, he must be willing to take strictly administrative action."[20] Even though the Army Court of Military Review did not focus on this issue in deciding either case, two judges had different views of the impact of this evidence. A literal reading of the rule appears to limit improper examinations to only those in which "disciplinary proceedings" are intended. Is the Army's present policy of convening an administrative elimination board for drug offenders a disciplinary proceeding?

Although there are arguments for both sides of this question, one may take the position that an administrative elimination action is not a disciplinary proceeding as contemplated by the rule. Support for this position can be found in several places. Rule for Courts-Martial 306(c)[21] which delineates the various options which a commander has when a member of his unit commits an offense, clearly distinguishes between administrative action which would include administrative elimination action and action under either nonjudicial punishment or court-martial. Part V of the 1984 Manual[22] continues this distinction. While nonjudicial punishment can only be given for a violation of the punitive articles of the Uniform Code of Military Justice (UCMJ), paragraph 1(g) of this section of the MCM indicates that administrative measures are not punishment and can be used to correct undesirable conduct, regardless of whether the conduct violates any of the punitive articles. Furthermore, action under a disciplinary proceeding normally bars further disciplinary action for the same conduct;[23] whereas administrative measures will not limit the concurrent use of disciplinary proceedings. Under these principles an adverse elimination action will not qualify as a disciplinary proceeding. In summary, even though an administrative elimination action can exact an enormous hardship on the respondent, it is submitted that it is not a disciplinary proceeding. This definition of a disciplinary proceeding will focus attention on whether the commander intended to take either court-martial or article 15 action against any offender.

The Reasonableness Test

Another requirement of Military Rule of Evidence 313(b) is that the examination must be reasonable. A recent Army Court of Military Review case, *United States v. Valenzuela*,[24] discussed this requirement. In *Valenzuela*, the commander established a urine testing program which required all soldiers returning from leave to be tested. His purpose was to determine unit readiness with a secondary purpose of deterrence. Although the military judge found the commander's primary purpose was proper, he suppressed the test results because he found a lack of military necessity for collecting the urine and found that urine testing was an unreasonable intrusion into the soldier's privacy. In reviewing the judge's decision, the court applied a reasonableness standard. The reasonableness standard is taken from a footnote in *Middleton* where the court held that health and welfare type inspections were expected by the soldier and tolerated by society so long as the "circumstances of the inspection not be unreasonable."[25]

In assessing the commander's actions in *Valenzuela*, the court overruled the trial judge and found the inspection was reasonable. There were three grounds for this conclusion. First, the commander's decision to inspect was not a subterfuge for a search nor was it based on irrational grounds. Inspecting to ensure readiness was reasonable, in the court's view, because drugs are a threat to unit readiness and inspecting soldiers returning from leave has a rational basis because these soldiers, away from the unit environment, would be more likely to be tempted to use drugs. Secondly, the inspection was a reasonable intrusion into the soldier's expectation of privacy because urinalysis testing is common place and expected by the soldier. Finally, the actual testing was performed as a normal urinalysis and was not done in a degrading or improper fashion.

Another aspect of reasonableness is whether the scope of the examination is properly limited. For example, if the purpose of the examination is to ensure that there is no ammunition in a soldier's possession after the unit has fired its weapons, then requiring the soldier to take out his wallet and examining his credit cards would be outside the scope of this examination. Consequently, if a stolen credit card was found during this procedure, this examination would not be a valid inspection because it was not reasonable in scope. In *United States v. Brown*,[26] The Court of Military Appeals decided that when an inspecting officer removed and examined a folded piece of paper from the accused's pocket and discovered it to be a stolen bond, this went beyond the scope of a valid health and welfare inspection directed at looking for weapons, drugs, and sanitary conditions. As the court noted:

> [I]f the only purpose of an inspection is to make sure that all stereos and televisions are identified with a personal marking, it logically would be outside the scope of that inspection to look into the pockets of pants and jackets of a soldier whose barracks was being inspected. Likewise . . . it does not appear that any of the multiple purposes of the inspection as set forth by [the commander] properly led [the inspecting officer] into a folded piece of paper which he removed from appellant's jacket pocket.

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[19] 21 M.J. at 594.

[20] 23 M.J. at 898.

[21] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 306(c) [hereinafter R.C.M.].

[22] Manual for Courts-Martial, United States, 1984, Part V.

[23] Nonjudicial punishment for offenses other than minor offenses does not bar trial by court-martial. Uniform Code of Military Justice art. 15(f), 10 U.S.C. § 815 (1982).

[24] CM 8701361 (A.C.M.R. 31 Aug. 1987).

[25] 10 M.J. at 128 n.10.

[26] 12 M.J. 420 (C.M.A. 1982).

. . . [C]ommanders and persons conducting such inspections must be ever faithful to the bounds of a given inspection, in terms both of area and purpose.[27]

Although *Brown* was decided prior to the 1984 amendment to Military Rule of Evidence 313(b), its rationale was specifically followed by the Court of Military Appeals in its most recent inspection case, *United States v. Ellis.*[28] In *Ellis*, an NCO was examining rooms for neatness and cleanliness at the commander's direction. While examining the accused's room, the NCO noticed a shaving kit hanging from the accused's bed. He took the kit and dumped its contents on the bed, only to find some drug paraphernalia among the contents. The accused was later charged with violating a regulation by possessing these drug related items. At the subsequent court-martial, the accused challenged the inspection as an unlawful search and seizure. The accused's primary contention was that the NCO had exceeded the scope of the examination directed by the commander when he seized the shaving kit and emptied its contents. In addressing this issue, the court noted: "The reasonableness of an inspection is determined by whether the inspection is conducted in accordance with the commander's inspection authorization, both as to the area to be inspected . . . and as to the specific purposes set forth by the commander for ordering the inspection."[29] If the examination exceeds the commander's guidelines, then the examination will not qualify as an inspection and normal search and seizure law applies. Applying these principles to the facts in *Ellis*, the court found that the examination was reasonable and it comported with Military Rule of Evidence 313(b). A shaving kit hanging from a bed detracted from the orderliness of the room and had a potential for sanitary problems. Therefore, the NCO acted reasonably when he seized the kit and examined its contents.

Circumstances Indicative of a Subterfuge

Another issue which may arise when analyzing an inspection under Military Rule of Evidence 313(b) is whether the inspection is one which requires a heightened scrutiny of the government's purpose. Whenever the purpose of the examination is to find weapons or contraband and: (1) is directed immediately following a specific offense being reported and was not previously scheduled; (2) only selects specific soldiers for examination; or (3) treats certain soldiers in a substantially different intrusion; then the rule places a higher burden on the government. Under these enumerated circumstances, the government must show by clear and convincing evidence that the inspection had a proper primary purpose in order to overcome the presumption that such an examination is a subterfuge for a search.

This section of the rule appears to say that the enhanced scrutiny requirements of the rule only apply in the specifically identified circumstances. In fact, the Air Force Court of Review has so held[30] but should the rule be so rigidly enforced? For example, why should examinations directed at locating weapons or contraband be any more prone to be a subterfuge for a search than an examination to locate recently missing or stolen property? Is this section to be viewed as merely illustrative of common search subterfuges or is it to be viewed as exhaustive? The drafter's analysis indicates that this section identifies those situations which objectively look like a subterfuge.[31] Yet there can certainly be other examples which are not described by this section which also identify a probable subterfuge for a search. The spirit of the rule would appear to require the same heightened scrutiny of these examinations. A recent case suggested that this section was drafted to provide commanders with specific guidance so that subterfuges for searches could be avoided.[32] While this is a laudible objective, modifying the rule to encompass other likely subterfuge searches would not make the rule too complex for the commander to apply. Hopefully, the Court of Military Appeals will address this issue in its future decisions.

A recent Air Force Court of Military Review decision illustrates how Military Rules of Evidence 313(b)(1) and 313(b)(2) are to be applied. In *United States v. Heupel,*[33] a policy existed at Griffiss Air Force Base that any airman entering the correctional custody facility[34] (CCF) was required to undergo a urinalysis test. The reason for this policy was to identify drug abusers and provide the commander with information regarding the airman's fitness for further military service, his need for drug rehabilitation, and alert the commander to drug problems in the unit. The results of these test, however, would not be available until at least three to five months later. In *Heupel*, the accused, who received an article 15 for a two day AWOL, was sent to CCF, and underwent the urinalysis procedure. The military judge ruled that the results of this examination were inadmissible because Military Rules of Evidence 313(b)(1) and 313(b)(2) were applicable, and the government was unable to meet the enhanced burden of proof. The trial judge reasoned that Military Rule of Evidence 313(b)(1) was applicable because the accused had committed a recent offense and Military Rule of Evidence 313(b)(2) was triggered because all correctees were specifically selected within the meaning of the rule.

Coming to the court on government appeal, the *Heupel* case gave the Air Force Court of Military Review an opportunity to interpret Military Rules of Evidence 313(b)(1) and 313(b)(2). The court disagreed with the judge's conclusion that Military Rule of Evidence 313(b)(1) applied, and interpreted Military Rule of Evidence 313(b)(1) to apply

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[27] *Id.* at 423.

[28] 24 M.J. 370 (C.M.A. 1987).

[29] *Id.* at 372.

[30] *See* United States v. Thatcher, 21 M.J. 909 (N.M.C.M.R. 1986), where an examination to locate missing tools was held not to fall under Military Rule of Evidence 313(b)(1).

[31] *See* Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 313 analysis, app. 22, at A22-23 [hereinafter Mil. R. Evid. 313 analysis].

[32] 24 M.J. 271 (C.M.A. 1987).

[33] 21 M.J. 589 (A.F.C.M.R. 1985).

[34] A correctional custody facility is a unit in which intensified training is conducted for persons who are temporarily assigned to the unit as punishment pursuant to nonjudicial punishment under UCMJ, article 15.

only to situations where the inspection was conducted to discover the perpetrators or fruits of a recently committed, yet unsolved, crime. Because the identity of the person who went AWOL two days was known and the examination was not directed at uncovering any fruits of that offense, Military Rule of Evidence 313(b)(1) was held not to apply. The drafter's analysis of the rule supports the court's position.[35] Military Rule of Evidence 313(b)(1) is based on the case of *United States v. Lange*,[36] where a shakedown inspection was held to be a search when it was conducted immediately following the report of a barrack's larceny and was directed at the rooms adjacent to the site of the larceny.

The *Heupel* court did, however, concur in the trial judge's interpretation of Military Rule of Evidence 313(b)(2). Selecting all persons entering CCF for a urinalysis does pick out only certain individuals, namely, those who get CCF punishment from an article 15. The drafter's analysis of the rule indicates that the language "specific individuals" means persons identified on the basis of individual characteristics, rather than by duty assignment or membership in a unit subdivision.[37] Apparently this would allow the commander to select all his vehicle drivers for testing but would not allow selection of everyone with an article 15 during the last two months.

Gate Examinations

Military Rule of Evidence 313(b) also covers examinations at installation entry and exit points. Case law from the Court of Military Appeals in the late 1970s established a rule that the commander balance several factors before legitimately authorizing a gate examination.[38] While the current Military Rule of Evidence 313(b) does not specifically incorporate these requirements, it is unclear if these factors still applied. The most notable of these factors was a requirement that the examiner or law enforcement officer not have discretion over who would be examined. The court has recently cast doubt upon the validity of this precedent.[39]

In *United States v. Jones*,[40] a command policy authorizing a gate examination for vehicles entering a Naval Air Station was challenged. The facts indicated that the commander had directed that vehicles be randomly examined with the determination of randomness left to the supervisor or senior policeman at the gate. Using a drug detection dog, marihuana was found in the accused's car. In addressing this case, the Court of Military Appeals applied a hybrid[41] of the Military Rule of Evidence 313(b) analysis and asked two questions, the substance of which were: (1) Was the examination pursuant to a command policy? and (2), was the purpose of the examination to zero-in on the accused's vehicle or to protect the installation? Since the parties had stipulated to an affirmative answer to question one, the crux of the case was the second question. The accused had contended that leaving the discretion over who would be examined made the examination unreasonable per se. The Court of Military Appeals specifically rejected this argument and ruled that any precedent which so held was overturned. The court found that there was no evidence to suggest that the accused's car had been singled out for examination, and ruled that the general purpose of the examination was to protect the installation's security and hence the evidence was admissible.

Does the *Jones* case signal an end to the Court of Military Appeals' earlier precedent on gate examination? The court appears to be suggesting this in the *Jones* opinion and is apparently adopting Military Rule of Evidence 313(b) as the new test: "Mil. R. Evid. 313(b) establishes standards for domestic gate inspections reflective of the balance between the responsibility of the commander to secure the safety and welfare of his installation and the rights of persons and property."[42] This language suggests that the rule subsumes the earlier factors which a commander was required to balance. A commander may now simply follow the rule and if he or she does then the correct balance is achieved. The effect of this ruling will not be immediately felt in the Army because AR 210–10[43] and AR 190–22[44] incorporated the earlier, more restrictive case law into the gate inspection requirements. Presumably these regulations will be adjusted to comport with the Court of Military Appeals' interpretation of Military Rule of Evidence 313(b) and give the commander more flexibility.

Urinalysis Testing Under Military Rule of Evidence 313(b)

The most recent Court of Military Appeals case on a urinalysis inspection is *United States v. Johnston*.[45] *Johnston* is of particular importance for Military Rule of Evidence 313(b) because it is the first case reviewed by the court where the trial itself occurred after the current Military Rule of Evidence 313(b) was adopted. In *Johnston*, the military judge ruled that the results of a urinalysis conducted on the staff at a Naval Brig were inadmissible on several grounds. One of the findings of the military judge was that

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[35] Mil. R. Evid. 313 analysis at A22–23.

[36] Supra note 2.

[37] Mil. R. Evid. 313 analysis at A22–23.

[38] DA Pam. 27–22 at 159–60.

[39] For an excellent discussion of recent C.M.A. and United States Supreme Court cases in this area see Anderson, *Permissible Law Enforcement Discretion in Administrative Searches*, The Army Lawyer, Sept. 1987, at 26.

[40] 24 M.J. 294 (C.M.A. 1987).

[41] The word "hybrid" is used because COMA never specifically addressed the primary purpose issue in the *Jones* case. Perhaps the second question is merely another way of asking this question. Furthermore, the first question is not taken directly from the rule but certainly is implicit in the rule since an examination must be command directed to be valid. Did the Court of Military Appeals select the language in *Jones* to signal a different analysis for gate examinations or were the words merely inartfully chosen. If the court had restructured the questions and asked does the examination have a proper primary purpose and is the examination reasonable, *Jones* would be more consistent with its other recent Military Rule of Evidence 313(b) decisions.

[42] 24 M.J. at 295.

[43] Army Reg. 210–10, Installations: Administration (12 Sept. 1977) [hereinafter AR 210–10].

[44] Army Reg. 190–22, Military Police: Searches, Seizures, and Disposition of Property (1 Jan. 1983) [hereinafter AR 190–22].

[45] 24 M.J. 271 (C.M.A. 1987).

the inspections were a subterfuge for a search because most of the monthly urinalysis tests were conducted at the end of the month. Apparently the judge felt that these dates were selected so that more people could be caught using drugs. In analyzing this issue, the court applied a methodology based on Military Rule of Evidence 313(b). First, the court looked at the primary purpose question. The urinalysis in *Johnston* was conducted for two reasons: (a) to ferret out illegal drugs and protect the health and fitness of the members of the unit; and (b) detect drug abuse among the members of the brig staff who were responsible for the security at the brig. Finding both of these purposes to be proper, the court then looked to see if any special factor existed which would convert a valid inspection into a subterfuge search. These are the special circumstances listed in Military Rules of Evidence 313(b)(1), 313(b)(2), and 313(b)(3). The Court of Military Appeals found none of these factors existed. There was no evidence which showed the tests were scheduled at the end of the month due to any reports of drug offenses during the period, everyone in the unit was required to be tested, and everyone was treated uniformly during the test. Thus, the court concluded that no subterfuge existed.

The other reasons cited by the trial judge in *Johnston* for rejecting the urinalysis results were that the regulation directing the monthly urinalysis had not been correctly followed and that the selection of the dates for testing had been left to the discretion of a law enforcement officer. In addressing these issues, the court applied the reasonableness test. The unit was reasonable in the way it interpreted and applied the regulation; and it was reasonable for a law enforcement officer to decide the testing dates since everyone in the unit was a law enforcement official. Furthermore, the court found the discretion vested in this officer was not impermissibly broad. The regulation required the test be given to all the unit members on the same day. Thus, no discretion existed over who would be tested and how the tests were to be administered, and any discretion over when the tests were given was limited by operational constraints and the mandate that everyone be tested on the same day. The court determined that the urinalysis was conducted in a reasonable fashion and it qualified as an inspection.

Future Changes in Military Rule of Evidence 313(b)

Recent events may influence a rewriting of Military Rule of Evidence 313(b). One is the United States Supreme Court view of administrative inspections as evidenced by its decision in *New York v. Burger*;[46] a second is Judge Cox's view of privacy in the barracks; while a third is criticism of the primary purpose test.

In *Burger*, police performed a warrantless examination of a junkyard pursuant to a New York statute permitting such action and discovered stolen automobile parts. The owner, who was arrested for possession of stolen property, sought to suppress this evidence because this administrative inspection violated the Constitution. The Supreme Court upheld this administrative inspection because this business was one which was closely regulated by the government and therefore a lesser expectation of privacy resulted. Under circumstances where the government interest in regulating is strong and the privacy interest is diminished, a warrantless inspection could be reasonable. The court then went on to identify three requirements for such an inspection to be constitutional. The government interest must be strong; the warrantless inspection must be necessary to achieve this interest; and the inspection must be implemented under a program which gives adequate notice to those subject to inspection and which is reasonably limited in terms of scope and discretion.

Will *Burger* have a military application? Arguably it will if the military is viewed as similar to a closely regulated business. If the three criteria from *Burger* were applied to the military's interest in conducting inspections to detect contraband and weapons, then a regulation authorizing this type of examination should pass constitutional scrutiny so long as the regulation is properly limited in terms of scope and discretion. The military has a strong interest in detecting such items and an inspection is necessary to accomplish this objective. Whether Military Rule of Evidence 313(b) will or should be changed to comport with the Supreme Court's rationale in *Burger* remains to be seen. Perhaps the present system is preferable in that it preserves some privacy in the barracks while vesting in the commander sufficient authority to control his unit. But clearly the *Burger* decision, along with other recent Supreme Court precedent,[47] signals a lessening of constitutional restrictions in this area.

In his concurring opinion in *United States v. Moore*,[48] Judge Cox called for a reexamination of the application of the fourth amendment to the barracks inspection. Judge Cox stated that since a soldier in the barracks had little, if any, reasonable expectation of privacy then applying the fourth amendment to a command directed inspection is illogical. Judge Cox appears to be waving a flag for counsel to litigate this issue. Perhaps a future case will explore this issue and reveal the other judges' view of this position.

The primary purpose test has been recently criticized because it requires evaluation of the commander's subjective intent.[49] This test encourages the commander to reorder his reasons for directing an examination after the fact. As a practical matter, any trial counsel worth his salt will educate the commander on the in's and out's of Military Rule of Evidence 313(b). This places a great temptation on the commander to rethink his reasons for acting when he or she learns that the primary purpose test controls the admissibility of evidence under Military Rule of Evidence 313(b). Consequently, the subjective nature of the test lends itself to actual or apparent abuse. One writer has suggested that an objective test would alleviate this problem.[50]

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[46] 107 S. Ct. 2636 (1987).

[47] *See* New Jersey v. T.L.O., 105 S. Ct. 733 (1985). For an excellent discussion of the application of this case to military search and seizure law see Wright, *How to Improve Military Search and Seizure Law*, 116 Mil. L. Rev. 157 (1987).

[48] 23 M.J. 295, 299 (C.M.A. 1987).

[49] *See* Anderson, *Permissible Law Enforcement Discretion in Administrative Searches*, The Army Lawyer, Sept. 1987, at 28 n.14.

[50] *See* Wright, supra note 47, at 213–18.

Conclusion

Military Rule of Evidence 313(b) was amended in 1984 with a view toward returning the law on military inspections to its traditional position. The premise of the rule is that an examination whose primary objective is not prosecutorial will qualify as a valid inspection thereby making the fruits of the examination admissible. While the primary purpose test is not always easy to apply, military courts have nevertheless accepted it as a viable means of sorting out the subterfuge search. Recent Court of Military Appeals decisions have signaled that Military Rule of Evidence 313(b) will be followed in evaluating military examinations. The *Jones* case indicates that Military Rule of Evidence 313(b) will be followed when evaluating gate examinations; the *Johnston* case holds that Military Rule of Evidence 313(b) controls the urinalysis inspection; and the *Ellis* case underscores the reasonableness requirement of the rule. The *Johnston* case is of particular importance for military inspections because it established a clear methodology for applying Military Rule of Evidence 313(b). If an examination has a proper primary purpose, if it is conducted in a reasonable manner, and if it does not involve one of the special circumstances listed in Military Rules of Evidence 313(b)(1), 313(b)(2), or 313(b)(3), then it meets the requirements of Military Rule of Evidence 313(b) and is acceptable as an inspection. Recent events may encourage a change in Military Rule of Evidence 313(b). But, for the present time, the law on military inspections appears to have returned to its traditional view.

Clerk of Court Notes

Errors in Initial Promulgating Orders

In addition to the customary statistics featured in our Clerk of Court Notes in this issue, we publish for your information—and, we hope, your remedial action—the following: In 1987, when the Army Court of Military Review issued 2,116 decisions, the Court also issued 288 Notices of Court-Martial Order Correction. In other words, the Court found an error or deficiency in 13.6 percent of the initial promulgating orders in cases forwarded for appellate review. One of every seven orders required correction!

In all, the 288 Notices corrected 383 errors. In order of frequency, the error types were:

Specification erroneous or incomplete (140)
Finding or other disposition shown incorrectly (58)
Accused incorrectly identified (52)
Plea incorrectly shown (34)
Date of sentence, action, or CMO wrong or missing (31)
Convening orders cited incorrectly or incompletely (21)
Charge or Specification incorrectly designated (15)
Adjudged sentence stated incorrectly (9)
Convening authority action inaccurately stated (8)
Sentencing authority (court, judge) incorrect (4)
Other errors not included above (11)

These figures do not include errors found by the Clerk's office during inprocessing and corrected by issuance of a corrected copy of the promulgating order before the case reached the Court.

Court-Martial Processing Times

The table below shows the Armywide average processing times for general courts-martial and bad-conduct discharge special courts-martial for the second quarter of Fiscal Year 1988. Previously published first quarter figures are shown for comparison.

General Courts-Martial

	1st Qtr	2d Qtr
Records received by Clerk of Court	405	404
Days from charging or restraint to sentence	45	50
Days from sentence to action	48	50
Days from action to dispatch	5	4
Days from dispatch to receipt by the Clerk	9	8

BCD Special Courts-Martial

Records received by Clerk of Court	168	168
Days from charging or restraint to sentence	34	34
Days from sentence to action	52	44
Days from action to dispatch	5	4
Days from dispatch to receipt by the Clerk	10	7

Court-Martial and Nonjudicial Punishment Rates Per Thousand

First Quarter Fiscal Year 1988; October–December 1987 (corrected)

	Army-Wide		CONUS		Europe		Pacific		Other	
GCM	0.50	(2.00)	0.38	(1.51)	0.76	(3.04)	0.69	(2.75)	0.31	(1.24)
BCDSPCM	0.28	(1.14)	0.29	(1.15)	0.34	(1.35)	0.11	(0.45)	0.37	(1.49)
SPCM	0.07	(0.28)	0.08	(0.31)	0.08	(0.31)	0.00	(0.00)	0.06	(0.25)
SCM	0.46	(1.84)	0.42	(1.69)	0.56	(2.23)	0.54	(2.16)	0.31	(1.24)
NJP	28.05	(112.22)	28.52	(114.07)	28.51	(114.04)	30.84	(123.35)	34.53	(138.12)

Note: Figures in parentheses are the annualized rates per thousand.

Court-Martial and Nonjudicial Punishment Rates Per Thousand

Second Quarter Fiscal Year 1988; January–March 1988

	Army-Wide	CONUS	Europe	Pacific	Other
GCM	0.51 (2.02)	0.48 (1.90)	0.59 (2.35)	0.60 (2.40)	0.43 (1.71)
BCDSPCM	0.31 (1.24)	0.33 (1.30)	0.34 (1.38)	0.13 (0.51)	0.43 (1.71)
SPCM	0.07 (0.29)	0.08 (0.31)	0.08 (0.31)	0.02 (0.07)	0.00 (0.00)
SCM	0.44 (1.74)	0.40 (1.62)	0.51 (2.05)	0.55 (2.19)	0.55 (2.20)
NJP	31.52 (126.10)	33.16 (132.62)	30.33 (121.34)	31.76 (127.03)	35.39 (141.56)

Note: Figures in parentheses are the annualized rates per thousand.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

The Court of Military Appeals Reestablishes the Limited Defense of Partial Mental Responsibility

As part of the insanity defense reform generated by article 50a, UCMJ,[1] the drafters of the corresponding changes to the Manual for Courts-Martial[2] swept away the limited defense of partial mental responsibility. As revised, R.C.M. 916(k)(2) provides: "A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule is not a defense, nor is evidence of such a mental condition admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense."[3] Thus, psychiatric evidence, not rising to the level of a "severe mental disease or defect," was decreed inadmissible to negate a specific intent. The Court of Military Appeals in *Ellis v. Jacob*,[4] however, revives the limited defense of partial mental responsibility and, in doing so invalidates R.C.M. 916(k)(2).

Staff Sergeant (SSG) Joseph Ellis was charged with the unpremeditated murder of his eleven year-old son. In his defense, his trial defense counsel moved to admit expert psychiatric testimony that sleep deprivation affected his state of mind at the time of the offense and thus, SSG Ellis could not form the requisite intent. In addition, both SSG Ellis and another soldier testified as to Ellis's mental and physical state at the time of the offense. The military judge denied the motion.

Ellis's counsel, however, sought interlocutory relief and filed an application for extraordinary relief with the Army Court of Military Review. That petition was denied. A writ-appeal petition was then filed with the Court of Military Appeals. That court issued a show cause order and later heard oral argument.[5]

Judge Cox delivered the opinion of the court, joined by Chief Judge Everett and Judge Sullivan. The court first observed that the "new" construction of R.C.M. 916(k)(2) raised obvious constitutional concerns.[6] To illustrate this point, the court noted that the government could prove intent or other *mens rea* by whatever means available while the defense can do nothing to disprove it short of presenting a complete insanity defense.[7] Moreover, the court noted that the President's rule-making authority in the Manual for Courts-Martial under article 36, UCMJ did not extend to matters of substantive law.[8] Thus, the President's power in promulgating an insanity standard was limited to the boundaries of the legislative act.

Turning to the language of article 50a, UCMJ, the court was faced with construing the last sentence of the standard: "Mental disease or defect does not otherwise constitute a defense."[9] In interpreting this language, the court had to decide whether the words "constitute a defense" should be interpreted as referring to affirmative defenses or include attacks on an element of a crime. The court first noted that if they used the ordinary meaning of affirmative defenses, that the statute had nothing to do with attacks on particular elements of an offense. Furthermore, even giving the government the benefit of the doubt, that this language was ambiguous, the court found that the legislative history did not support the government's claims. Additionally, the court noted that the three decisions in federal courts that

[1] Uniform Code of Military Justice art. 50a, 10 U.S.C.A. § 850a (West Supp. 1987) [hereinafter UCMJ].

[2] Manual for Courts-Martial, United States, 1984.

[3] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(k)(2).

[4] 26 M.J. 90 (C.M.A. 1988).

[5] The summary of facts and case history are taken from the *Ellis* opinion. This case has added significance for military practitioners, not mentioned in the opinion. The significance is in the manner the case reached appellate review. Suppression of evidence is not a ruling that is generally reviewable by an extraordinary writ. Thus, the Court of Military Appeals must have applied the doctrine of Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983), determining that this issue was a "recurrent" problem and lower courts were in need of immediate guidance, in deciding to hear this issue at this time.

[6] 26 M.J. at 92.

[7] *Id.*

[8] *Id.*

[9] UCMJ art. 50a.

had addressed the issue clearly distinguished attacks on *mens rea* as opposed to diminished capacity defenses. Thus, the court held that since article 50a, UCMJ did not preclude SGT Ellis from claiming he lacked the specific intent to kill, R.C.M. 916(k)(2), must also be ineffective in achieving this result.[10]

The *Ellis* decision, however, notwithstanding its invalidation of R.C.M. 916(k)(2), does not completely open the door for the admissibility of all psychiatric evidence. The evidence must still be relevant and permitted by article 50a, UCMJ. Assuming the evidence is relevant, the key distinction will be between general intent and specific intent crimes.

If the crime charged requires only a general criminal intent, psychiatric evidence that does not potentially rise to the level of a "severe mental disease or defect," the threshold requirement of article 50a, should not be admitted. Otherwise, the insanity defense would be resurrected under a lesser guise not permitted by article 50a, UCMJ. For example, in the *Ellis* case, the accused made no claim that his mental condition rose to the level of a "severe mental disease or defect." Thus, if the crime in *Ellis* was a general intent crime, this psychiatric evidence would not be admissible. Note, however, it is generally within the purview of the factfinder to decide if the evidence presented equates to a "severe mental disease or defect." If the psychiatric evidence does not rise to this level, in a general intent crime, the factfinder should disregard this evidence on the merits.

Correspondingly, in a specific intent crime, psychiatric evidence or testimony need not meet any threshold requirement before it becomes admissible. If the accused has any type of mental condition that is relevant to the offense, it may be used to try to negate a specific intent. Major Williams.

Huddleston v. United States—Supreme Court Adopts Test Similar to Court of Military Appeals' Test for Admissibility of Extrinsic Acts Evidence.

Introduction

The introduction of extrinsic acts evidence under Military Rules of Evidence (Mil. R. Evid.) 404(b)[11] is often hotly contested in courts-martial. In a close case, it may mean the difference between a conviction and an acquittal. One of the problems involved with extrinsic act evidence is the potential for a "trial within a trial"; a lengthy and often confusing hearing to determine whether the accused[12] committed the extrinsic act. The standard of proof to apply during this examination has been historically unclear.

Prior to the adoption of the Military Rules of Evidence, the government was required to demonstrate by plain, clear, and conclusive evidence that the accused committed the extrinsic act.[13] After the adoption of the Military Rules of Evidence, Mil. R. Evid. 404(b) limited the admissibility of such evidence;[14] the standard of proof to apply, however, remained unclear. Finally, in *United States v. White*,[15] the Court of Military Appeals held that the government had to produce evidence that is sufficient, when considered in the light most favorable to the government, to support a finding that the accused committed the extrinsic act.[16] This determination was based on Mil. R. Evid. 104(b).[17]

Federal Rule of Evidence (Fed. R. Evid.) 404(b) is identical to Mil. R. Evid. 404(b),[18] but the federal circuits have been in conflict regarding the quantum of proof required for extrinsic acts evidence.[19] The Supreme Court has now resolved that conflict and imposed the same standard that the military adopted in *White*.

United States v. Huddleston

> Guy Rufus Huddleston was charged with one count of selling stolen goods in interstate commerce and one count of possessing stolen property in interstate commerce. The two counts related to two portions of a shipment of stolen Memorex video cassette tapes that Huddleston was alleged to have possessed and sold, knowing that they were stolen. [citations omitted].[20]

The evidence at trial showed that Huddleston had sold 5,000 tapes for at least $1.50 under the manufacturer's cost. The only dispute at trial was whether Huddleston knew the tapes were stolen.

The government was allowed to introduce evidence of two "similar acts" by Huddleston under F.R.E. 404(b) to show his knowledge. One of the similar acts was the prior

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[10] 26 M.J. at 93.

[11] Manual for Courts-Martial, United States, 1984 Mil. R. Evid. 404(b) [hereinafter Mil. R. Evid. 404(b)]. "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

[12] While extrinsic acts evidence may be admitted regarding someone other than the accused, the more typical case involves this type evidence being offered against the accused.

[13] United States v. Janis, 1 M.J. 395 (C.M.A. 1976).

[14] United States v. Brannan, 18 M.J. 181 (C.M.A. 1984).

[15] 23 M.J. 84 (C.M.A. 1986). The court also provided a method for analyzing issues under Mil. R. Evid. 404(b). The trial court should look to: first, whether the evidence proves the accused committed the extrinsic act; second, the purpose for which the evidence is offered and; third, the Mil. R. Evid. 403 balance test.

[16] *Id.* at 87.

[17] Mil. R. Evid. 104(b). "Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except where these rules or this Manual provide expressly to the contrary."

[18] Mil. R. Evid. 404(b), *supra*, note 11.

[19] Huddleston v. United States, 56 U.S.L.W. 4363, 4364, n.2 (U.S. May 3, 1988). Four circuits allow extrinsic act evidence if the evidence is sufficient to allow the jury to find that the defendant committed the act. Two circuits require a preponderance of the evidence and four circuits require clear and convincing evidence.

[20] *Id.*

selling of 12" black and white televisions for $28 each. The other similar act was Huddleston's attempted sale of $20,000 worth of kitchen appliances for $8,000. This second act occurred after the offenses with which Huddleston was charged.[21]

Huddleston testified that he was selling all of the items for another person who represented that the merchandise had been obtained legitimately. Huddleston also testified that he had no knowledge that any of the items were stolen.[22] Huddleston was found guilty on the possession charge only.

The conviction was reversed by the Sixth Circuit because the government failed to prove the extrinsic acts by clear and convincing evidence.[23] The court reconsidered its decision using a preponderance standard and held that the trial judge had not abused its discretion in admitting the evidence.[24]

The issue before the Supreme Court was whether the trial judge had erred in admitting the testimony pertaining to the televisions.[25] Particularly, Huddleston argued that the government had failed to prove that the televisions were stolen. If the televisions were not stolen, the circumstances surrounding their sale would have no relevance to Huddleston's knowledge in the charged crimes.

The basis of Huddleston's argument was that the admissibility of evidence was a preliminary question which should be ruled upon by the trial judge prior to presentation to the jury in accordance with F.R.E. 104(a).[26] Extrinsic acts would therefore have to be proved by a preponderance of the evidence to the trial judge.

The Supreme Court rejected this position and ruled that extrinsic act evidence "is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor."[27] Chief Justice Rehnquist, writing for a unanimous Court, stated that a trial court "simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . ."[28] Therefore, the Court looked to F.R.E. 104(b)[29] for guidance. In holding that there was sufficient evidence to conclude that the televisions were stolen and Huddleston knew that, the Court even considered the evidence about the appliances and the Memorex tapes.

The rationale for the Court's holding is the result of a straightforward reading of the Federal Rules and is consistent with the trend under the Federal Rules of allowing more evidence to reach the finder of fact. The resolution of the specific issue, however, is more curious. The Court emphasized that the trial judge should consider all of the evidence presented to the jury in deciding whether F.R.E. 104(b) has been met. The Court even invites trial courts to consider the evidence presented on the charged crimes regarding this issue. Initially, it appears that use of such evidence would be improper and the Court's reasoning seems circular. The jury will be asked to use all other evidence in the case to determine whether the extrinsic acts were committed by the defendant. Likewise, the extrinsic act evidence is supposed to help the jury determine the facts in the case as shown by all the evidence. Of course, the standard of proof—beyond a reasonable doubt—can only be decided by the jury after presentation of all the evidence. Should the jury use the other evidence if the standard of proof has not been met?

While this approach may seem unfair, it is appropriate. Even if it is not possible to say that the facts of the case are proved beyond a reasonable doubt, for purposes of F.R.E. 104(b) that standard need not be met. The key is to look to all the evidence before the jury to see if the jury can find the conditional fact. The Court noted from its decision in *Bourjaily v. United States*, "[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts."[30]

The Court expressed concern for possible abuses under F.R.E. 104(b) but concluded that safeguards exist to prevent such abuses. First, F.R.E. 404(b) requires the evidence to be offered for a proper purpose. Second, F.R.E. 402, as enforced through F.R.E. 104(b), requires the evidence to be relevant. Third, the evidence must survive the F.R.E. 403 balance test.[31] Finally, a limiting instruction may be requested under F.R.E. 105.[32]

As stated earlier, *Huddleston* has resolved the conflict among the circuits and has adopted a method for analysis similar to the method used in the military as stated in *White*. The only difference is that Huddleston suggests that trial courts look to the effects of F.R.E. 105 and limiting instructions after conducting the F.R.E. 403 balance test whereas in the military, such effects are considered at the

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[21] *Id.*

[22] *Id.*

[23] 802 F.2d 874 (6th Cir. 1986).

[24] 811 F.2d 974,975 (6th Cir. 1986).

[25] *Huddleston, supra* note 19, at 4364.

[26] Fed. R. Evid. 104. "Preliminary Questions. (a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."

[27] *Huddleston, supra* note 19, at 4366.

[28] *Id.*

[29] *See,* Mil. R. Evid. 104(b), *supra* note 11. Fed. R. Evid. 104(b) is the same less the second sentence.

[30] 107 S. Ct. 2775 (1987).

[31] Fed. R. Evid. 403 is identical to Mil. R. Evid. 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The strength of the evidence establishing the extrinsic act may be considered in the balancing test. *Huddleston, supra* note 19, at 4366.

[32] Fed. R. Evid. 105. "Limited Admissibility. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

time the M.R.E. 403 balance test is being conducted. A limiting instruction may minimize or eliminate the prejudicial effects. While military practice will not change as the result of *Huddleston*, it may bring the Court of Military Appeals back in line with its decision in *White*.

Recently, the Court of Military Appeals decided the case of *United States v. Mann*.[33] The issue in *Mann* was whether the military judge erred when he admitted testimony from a boy regarding sex offenses against him which had occurred four or five years before the charged sex offenses against the boy's half sister. The court ruled that the evidence should have been excluded under M.R.E. 403 as the accused "denied these acts occurred, the victim of the charged offenses disclaimed any memory of these acts, and the brother's testimony was not specific."[34] The court went on to say that "the members were unnecessarily tasked with determining whether the four acts of uncharged misconduct occurred before they could decide whether the charged acts occurred. Mil.R.Evid. 403 was designed to avoid such confusion."[35] According to *Huddleston*, such confusion should not result in the exclusion of the evidence but is part of the process of determining whether sufficient evidence has been presented to find the conditional fact. If sufficient evidence has not been presented and the extrinsic act evidence has been conditionally admitted, it is the responsibility of the opponent to move to strike the evidence.[36]

Therefore, whether the Court of Military Appeals looks to its own precedent in *White* or the Supreme Court precedent in *Huddleston*, the result should be the same. More extrinsic act evidence should reach the finder of fact and the confusion complained of in *Mann* should not be a serious factor in the balancing test of M.R.E. 403. Major Wittman.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer*.

Consumer Law Notes

AIDS-Free Club

In what is likely to be an expanding effort to capitalize on the fear and uncertainty engendered by the Acquired Immune Deficiency Syndrome (AIDS), a Florida corporation called "I'm Free, Inc." has established an AIDS "card club" that claims a nationwide membership of people testing free of the disease. After filing suit against the company alleging consumer fraud, false advertising, and deceptive trade practices based on the company's erroneous representation that it can, in effect, certify that a person is free of the AIDS virus, the Minnesota attorney general has entered a consent judgment with the company.

I'm Free, Inc., which advertised among singles groups and in local Minnesota newspapers, sold 6-month memberships in return for $50 and a medical form from a physician indicating a negative result to an AIDS antibody test. Members received lapel pins inscribed with the words "I'm Free," identification cards, and newsletters. The attorney general has asserted that such AIDS testing may be inconclusive because AIDS antibodies may not show up in tests for 6 weeks to 6 months after a person is infected with the disease. In addition, some people who are infected never develop antibodies and, once the full symptoms of AIDS develop, the antibodies may no longer be detectible.

The consent judgment issued against defendants prohibits them from using the words "I'm Free" in describing their organization, selling memberships in any purported AIDS-free organization in which membership is granted based upon one negative AIDS antibody test, selling any service or merchandise that purportedly is designed to help alleviate the effects of AIDS, and misrepresenting the benefits and nature of their "card club." Pursuant to the judgment, I'm Free, Inc., is also required to pay a $5,000 civil penalty and any subsequent intentional violation by the company will result in an additional civil penalty of $50,000.

Telephonic Trivia

The Iowa attorney general has begun investigating a telephonic trivia contest in which many Iowa residents have apparently received computerized phone calls with recorded messages offering them the chance to participate in a contest called Trivia Masters. The consumer is initially asked an easy trivia question, such as: "Does HBO stand for Happy Broadcaster Organization or Home Box Office?" After answering three such questions, the consumer is asked to pay a $20 to $35 entry fee to go on to the next level of competition, at which the consumer will try to answer 25 additional questions. Consumers are informed that at this second level correct answers will allow them to win cash prizes of up to $5,000. Participants who answer all 25 questions correctly become "Trivia Masters" eligible to participate in a national TV playoff that is said to be planned for next summer. The attorney general's office is investigating the possibility that this operation may violate state consumer protection and gambling laws and that consumers who send money may never hear from the company again.

Instant Skill Bingo

The Ohio attorney general has recently filed a lawsuit against American Holiday Association, a California company that has sent letters to consumers throughout Ohio promising a chance to win a $25,000 car and an equal amount in cash if the consumer completes a marketing survey and solves an "instant skill bingo" puzzle. Consumers, who are also required to include $2 or $3 with each entry, are supposedly notified if they correctly solve the puzzle

[33] 26 M.J. 1 (C.M.A. 1988).

[34] *Id.* at 5.

[35] *Id.*

[36] *Huddleston, supra* note 19, at 4366, n.7.

and must then pay an additional fee for the chance to solve a "tie breaker" puzzle. One consumer has reported paying over $500 in fees to continue the game without winning a prize. The Ohio attorney general has asked the court to order the company to pay $50,000 as a civil penalty and to make refunds to consumers who paid to enter the contest.

State Regulation of Charitable Solicitations

Although there is no federal regulation of charitable solicitations, many states have recently enacted such legislation or increased enforcement efforts with respect to existing state laws. Among the states devoting substantial effort to enforcing existing laws is Pennsylvania, in which the attorney general has recently entered an agreement with Missing Children of Allegheny County, Inc., pursuant to which that organization will pay $10,000 to two Western Pennsylvania charities, pay $4,500 in civil fines and costs, and turn over $11,000 in office furniture and other assets to charitable organizations. The attorney general's suit alleged that the company had provided little in the way of charitable services, operating instead as a private investigation agency that charged fees for such services as searches for children abducted by noncustodial parents and fingerprinting children. The attorney general's investigation revealed that the organization had raised nearly $340,000 and spent almost all this money on fund-raising costs, management, and general administration, spending less than 5 percent of the money it raised on actual charitable programs. The attorney general also claims that the organization failed to keep accurate records of receipts and disbursements, as required by Pennsylvania's law regulating "not-for-profit" organizations.

In another Pennsylvania action, the attorney general's Charitable Trusts Division recently obtained an agreement with Telestar Marketing, Inc., a professional solicitation company that used high-pressure tactics and misled consumers while selling tickets statewide for basketball games featuring the Pittsburgh Steelers. While the Steelers were apparently not involved in any way, tickets for nine games were sold via telephone by solicitors working in telephone "boiler rooms" around the state, telling potential contributors that they should be ashamed of themselves for refusing to help underprivileged children. Based upon the attorney general's allegation that Telestar failed to register with Pennsylvania's Bureau of Charitable Organizations prior to soliciting, failed to tell potential contributors that only about 10 percent of the $90,000 raised was to be given to the organization for which Telestar was soliciting, and misled those solicited by falsely claiming that ticket purchases were tax deductible and that solicitors were volunteers rather than paid professional fund raisers, Telestar agreed to pay the state $6,000 in costs of investigation and $4,000 in civil fines and to refrain from doing business in Pennsylvania for 4 years.

In an unrelated action, the Pennsylvania attorney general has obtained an agreement with a company that solicits contributions throughout the state to benefit a number of fraternal orders of police and firefighters. According to the agreement, these solicitations take the form of telephone calls during which the solicitors represent that they are calling on behalf of various groups and attempt to sell tickets to circuses, magic shows, and other events. The attorney general has alleged that the solicitors, representatives of M. Charles Productions, Inc., do not tell consumers that they are paid fund raisers and that only 15 to 20 percent of the funds collected benefit the organization on whose behalf they are soliciting. Under the terms of the agreement, written confirmation, indicating the amount of money being turned over to the organization, must be sent to the contributor within 5 days. In addition to copies of these confirmation slips, M. Charles is required by the agreement to provide the attorney general with each charity's written authorization to conduct the solicitation as well as copies of all written solicitation materials and scripts used by telephone solicitors.

Other states have made similar enforcement efforts. The Missouri attorney general has recently obtained a temporary restraining order (TRO) with respect to solicitation campaigns designed to fund efforts to find missing children and to increase drug awareness, which are currently among the most frequently seen campaigns. The TRO applies to the fund-raising activities of Child Search Advertising, "B" Promotional Managements, Retired Centurions, and Eldon Promotions, all of which allegedly requested donations to pay for book covers which the companies intended to have imprinted with pictures of missing children and drug awareness information and distributed to local school children free of charge. These fund raisers were targeted because they failed to register with the attorney general's office and because the callers failed to tell donators that the organizations were professional fund raisers, both of which are required of professional fund raisers by Missouri state law.

The Missouri attorney general has also recently filed a lawsuit against David John Heckler, a professional fund raiser who planned to raise approximately $4 million by selling tickets to variety shows. While Heckler's solicitors allegedly told consumers that the shows were hosted by the Vietnam Veteran's Leadership Program and the Missouri State Council of Firefighters, leading consumers to believe that the proceeds from the ticket sales would benefit special and disadvantaged children, the attorney general alleges that the "for profit" business received at least 80 percent of the proceeds from the ticket sales. In addition, solicitors apparently also informed donators that their operation was approved by the Missouri attorney general's office, which is seeking restitution for consumers who purchased the variety show tickets, a fine amounting to 10 percent of the consumers' restitution to be paid to the state, and a $1,000 penalty for each violation of the state's consumer protection laws.

A similar fund raising scam operating in Maryland was recently halted by a court order requiring the operators to pay $1.7 million in civil fines to the state and $614,935 in restitution to handicapped and retarded youngsters who were supposed to be the beneficiaries of circuses and ice shows promoted by the fund raisers. The fines and restitution were ordered against Richard Garden of Sarasota, Florida, whose multistate operation conducted phone solicitations in Maryland between 1984 and 1986. These solicitors used the names of Baltimore and Washington area charities to sell tickets to ice shows and to the so-called "Toby Tyler" circus, both of which were promoted and produced by Garden's operation. More than 17,000 Marylanders bought these tickets after being told that they would be given to handicapped, retarded, or underprivileged children.

The Minnesota attorney general has recently enforced similar laws by obtaining an Assurance of Discontinuance from Show Office, Inc., a professional fund raiser based in Florida. Show Office had solicited contributions by asking people to purchase tickets to an ice show on behalf of Amvets and the Jaycees. Contributors were told that their donations would permit handicapped and underprivileged children to attend the show. The attorney general's investigation revealed that only a small percentage of the tickets were actually used by these children. In addition, the investigation indicated that Show Office failed to register with the Charities Division of the Minnesota attorney general's office, that solicitors failed to inform potential donors that they were professional fund raisers, and that callers failed to disclose the amount solicited from each person that would be used for charitable purposes, all of which were required by Minnesota law.

In an order and opinion issued in December 1988, a senior judge for the Pennsylvania Commonwealth Court responded to a suit filed by the Pennsylvania attorney general's consumer protection bureau by ruling that the solicitors had violated the state's unfair trade practices and consumer protection laws. In a decision hailed by the attorney general, the judge indicated that the professional solicitors, John Arnold of Harrisburg and Charles Sheriff of Penbrook, misled the public by failing to tell prospective contributors that only about 10 percent of the money raised benefitted the nonprofit veterans' organization for which they were soliciting. The solicitations were based upon a contract with the veterans' organization pursuant to which the solicitors were permitted to use the society's name in fund raising in exchange for a $3,000 fee and the cost of printing the society's annual convention book. The solicitors apparently collected more than $40,000 in contributions and turned over to the society only the agreed $3,000 and $1,263 for printing costs.

Although many states already have in place legislation designed to protect consumers from solicitation scams, recent solicitation activities in some states have highlighted the need for protective legislation. In Wisconsin, a professional solicitor sold coupon books for free goods and services, assuring contributors that the proceeds would go to a charitable organization. The solicitor sold about $200,000 worth of coupon books in 1986 and 1987 but, although the books cost $24.95 each, the charitable organization received only $1.50 per book. In 1987 alone, the solicitor took in $80,000 but paid the charity only $5,000. In response to incidents such as this, the Wisconsin attorney general has proposed legislation that would require most Wisconsin charitable organizations to register and to file annual reports with the state Department of Regulation and Licensing. In addition, the new law would require that solicitors disclose both the percentage of solicited funds and the total value the charity will receive when soliciting funds. Proposed penalties for violating this law include forfeiture of up to $10,000, restitution to donators, attorneys' fees, and fines of up to $5,000.

While contributors can look increasingly to state laws for protection from solicitation scams, the most effective way to avoid these scams is to:

1) ask if the caller is a volunteer or a paid fund raiser;

2) ask what percentage of donations and/or what total amount will go to the charity involved;

3) offer to phone the charity to confirm the fund drive and/or to pay the charity directly;

4) check with local Better Business Bureaus and consumer protection offices to identify previously reported consumer complaints about the organization. Major Hayn.

Family Law Notes

Setting Child Support Obligations

"So, how much child support am I going to have to pay?" This question, and its mirror-image variant ("How much child support can I get?"), are asked hundreds of times each day in legal assistance offices throughout the world. Finally, some definitive rules are emerging that will help legal assistance attorneys respond with accurate, authoritative answers.

In the absence of a court order or an agreement between the parties, Army Regulation 608–99 provides a reasonably concise answer. The amount of family support is tied to the BAQ entitlement at the "with-dependent" rate for the soldier's pay grade. Only a few exceptions are recognized to excuse this support obligation, so the rules for determining support are fairly easy to apply. Unfortunately, simplicity is not always consonant with equity, and the amount of support called for by AR 608–99 is often woefully inadequate to meet the children's needs. This is especially so in cases involving multiple families, geographically dispersed families, and families with several children. As an aside, it is interesting to compare the Army's guidance with the directives from sister services. Both the Navy and the Marine Corps require more support to be paid when there is no court order or agreement between the parties; the regulation for these services is published at 32 C.F.R. Part 733. In contrast, the Air Force does not prescribe any dollar amount of support to be paid—the whole matter is viewed as one to be resolved in court. See 32 C.F.R. § 818.3.

There are valid reasons why AR 608–99 does not prescribe a more flexible and situationally dependent procedure for determining support obligations; commanders are neither trained nor empowered to adjudicate such issues. Nonetheless, in most cases, the regulatory requirement is the only standard, until it is supplanted by an agreement between the parties or a court order. This brings us back to the original question—how much support?

The federal Child Support Enforcement Amendments of 1984 directed states to develop statewide guidelines on how much support should be awarded. After much wrangling and debate, most states have promulgated guidelines that go a long way toward answering the question: "How much?" Typically, these guidelines are based on varying percentages of the absent parent's income, and are dependant on the number of children being supported. The states have hedged their bets somewhat by stating that the guidelines do not prescribe mandatory amounts; courts have discretion to deviate in appropriate cases. In practice, however, it appears that most courts are applying the guidelines in a fairly rigid manner, even when the parties agree to a different amount. Although this approach leaves little room for successful advocacy, it makes it easier to accurately predict the level of support obligation the court will impose.

The key, of course, is learning what guidelines have been approved. This should not be a problem for the state where

the installation is located, but legal assistance attorneys frequently counsel clients who will seek a divorce in a foreign jurisdiction. The problem of determining a foreign state's guidelines can be solved in two ways. For the short term, it is best to contact a legal assistance office, a special legal assistance officer, or the state child support office in the jurisdiction where the support issue will be resolved. In the meantime, we at TJAGSA are gathering copies of all the state guidelines and preparing them for publication and distribution to the field. This material will also include worksheets to be used in applying the guidelines and any mandatory documents relating to support that must accompany divorce petitions.

Even with these guidelines, however, a significant potential issue remains: How do you apply these state rules to a compensation scheme as complex as military active duty pay? If the guidelines call for 17% of gross income to be paid for the support of one child (as many of the guidelines do), does this mean gross base pay, or gross total pay, or something in between? It could even mean total gross pay *plus* an additional amount. Consider this: if 17% of gross pay is the measure, an E–4 who lives in the barracks and eats in the dining facility would pay less in child support than an E–4 who lives off-post and receives BAQ, separate rations, and perhaps VHA.

There are two ways around this inequity. First, apply the guideline only to base pay, because this is a sum that all soldiers of the same grade and time in service receive. The alternative is to constructively add the amount of BAQ and separate rations to a soldier's base pay even when the soldier does not receive these benefits. This approach equalizes the income of all similarly situated soldiers, and has the added advantage of equalizing soldiers' income with that of civilians for whom the guidelines were designed and who typically have monthly lodging and food expenses. That is, constructively adding the amounts of the BAQ and separate rations entitlements accounts for these somewhat unusual, in-kind components of military compensation in the support obligation determination process.

A similar adjustment might be appropriate when state guidelines are based on gross pay (as opposed to net or after-tax pay). The percentages in such guidelines usually are smaller than those designed to be applied to after-tax income, in recognition that income taxes are a mandatory monthly expense. Thus, the guideline for one child might call for 17% of gross income in one state while in another jurisdiction the amount is 20% of net income. What, then, is the proper method for handling military pay, with both taxable and nontaxable components? If a state guideline considers only net pay, there is no problem; a soldier's net pay is comparable to a civilian's net pay amount—the soldier simply required less gross pay to achieve the same after-tax income.

On the other hand, if the guideline is applied to gross pay, the soldier will be in a better position than a civilian counterpart who must pay taxes on all of his or her income. This is so because the guidelines include a built-in credit for an expense—taxes—that need not be paid in relation to BAQ, separate rations, VHA, and other components of military pay. It could be argued, therefore, that before applying a guideline based on gross income, a soldier's gross pay should be adjusted upward by an amount equal to his or her marginal tax rate times the nontaxable income. This would place the soldier's income on parity with the typical civilian's income that the state legislators or courts had in mind when they designed the guidelines.

All the foregoing presumes that states are authorized to consider BAQ, separate rations, and other components of military pay when setting support obligations. At least two Air Force members have challenged this notion in court, but neither have prevailed. In *Peterson v. Peterson*, 98 N.M. 744, 652 P.2d 1195 (1982), an airman argued that the state could not consider his BAQ, VHA, and separate rations entitlements in determining whether he had enjoyed a substantial change in financial circumstances (it appears that he avoided this income by living in the barracks while negotiating his support obligation and then later moved off-post). He based this position on the *McCarty* decision (453 U.S. 210 (1981)) and the notion that since these entitlements are reimbursements for specific types of expenses, the Supremacy clause prohibits states from using the sums for other purposes. The court declined to accept this position, noting that Congress had waived sovereign immunity regarding garnishment of military pay for support enforcement purposes. The judges felt that this fact was sufficient to dispel any impediment based on the Supremacy clause. While the decision is not obviously wrong, the reasoning may be faulty because the court failed to address the fact that BAQ, VHA, and separate rations are not subject to garnishment. See 5 C.F.R. § 581.104(h)(2).

The other reported case in this area is both more recent and better reasoned. In *Hautala v. Hautala*, 417 N.W.2d 879 (S.D. 1988), an Air Force sergeant again challenged a trial judge's consideration of BAQ and separate rations entitlements in setting a child support obligation. He raised two arguments: first, he asserted that the state definition of "income" did not encompass all components of his military compensation; he also asserted that since BAQ and other parts of his pay could not be garnished for support purposes, they could not be considered in setting a support obligation. The court made quick work of his first complaint, noting that the intent behind the state definition was to include a broad range of forms of compensation, including such things as BAQ and other entitlements. In meeting his second objection, the court relied on the recent Supreme Court decision in *Rose v. Rose*, 107 S. Ct. 2029 (1987), to affirm its power to consider all entitlements in setting support. In *Rose*, the issue was whether a state court could consider nongarnishable Veterans Administration disability benefits in setting a support obligation.

The Supreme Court noted that questions of garnishability involve problems of sovereign immunity, not the shielding of pay from support obligations, and held that the VA benefits could be considered. This analysis completely deflated Sergeant Hautala's argument, and provided the South Dakota court the authority it needed to affirm the use of BAQ and separate rations amounts in setting support obligations.

If all this sounds wonderful for custodial parents, it must be equally distressing for the majority of our clients, those who will have to pay child support. Is there any good news for these people? Generally, no. The trend clearly is toward higher support obligations that are more stringently enforced. There are a couple of strategies that may help reduce the financial burden, however. First, it may be to the client's advantage to remain in a situation where the guidelines in AR 608–99 are controlling (i.e., delay entering into

an agreement that will use the state guidelines to determine the support obligation). Additionally, it makes sense to respond to arguments about "adjustments" to military pay for BAQ, etc., by pointing out that guidelines are designed to be applied to pay actually received, not some theoretical construct. If a court is willing to entertain the obligee's arguments regarding adjustments, an enterprising legal assistance attorney should be able to develop rationales supporting a few additional adjustments favoring the military obligor. Finally, keep in mind that the law in a given case may be fashioned by bold assertions plausibly maintained. The argument that a soldier should not be required to pay more than the amount called for by military regulations, or more than what is commonly referred to as "the military allotment" (i.e., BAQ at the with-dependent rate) may be persuasive enough to carry the day. Perhaps there still is room for advocacy after all. Major Guilford.

Tax Notes

Depreciation Deduction Under Accelerated System Disallowed By Tax Court

One of the most perplexing areas in the federal income tax code is how to deduct depreciation on a capital asset. The area is complicated by the fact that Congress has enacted three major changes to the depreciation system in the last ten years.

Prior to 1981, residential property was depreciated under a regular, straight-line basis. Congress enacted a major change to the depreciation rules affecting all property "placed in service" after January 1, 1981. This system, referred to as the Accelerated Cost Recovery System (ACRS), allowed owners of residential rental property to depreciate the property over a nineteen year recovery period and use the 175% declining balance method. Congress significantly changed the depreciation system again under the 1986 Tax Reform Act for all property placed in service after 1986. The cost of property must now be depreciated using the straight line method over 27.5 years for residential real property. I.R.C. § 168 (West Supp. 1988). This new system is referred to as the Modified Accelerated Cost Recovery System (MACRS).

An issue that has confounded legal assistance attorneys is what system to use when property has been purchased prior to 1981 and converted to a rental property after that date. This is a common scenario in the military because soldiers often end up leasing property after they leave a duty station.

A recent Tax Court decision, *Hood v. Commissioner,* T. C. Memo 1988–205 (1988), should help clear up some of the confusion in this area. In *Hood,* the taxpayers purchased a beach home in Virginia Beach in 1969 and lived there until October 1982. They rented the beach home from 1982 through 1984 and calculated their depreciation deduction on their 1983 return using the Accelerated Cost Recovery System.

The Tax Court upheld the Internal Revenue Service (IRS) decision to disallow a portion of the accelerated depreciation deduction because the home was not "placed in service" after 1981 as required under ACRS. The court stated that property is placed in service when it is "first placed in a condition or state of readiness for a specifically assigned function, whether in trade or business, in the production of income, in a tax exempt activity, or in a personal activity." *Id.* at 206, *citing* Treas. Reg. § 1.167(a)–11(e)(1). The court found that the taxpayers' rental property was first placed in service when they commenced using the property as their personal residence and therefore concluded that they were not entitled to a depreciation deduction under ACRS.

The Tax Court decision did not address how to depreciate residential property purchased between 1982 and 1986 and converted to rental property after the effective date of the Modified Accelerated Cost Recovery System. Under this situation, a special rule applies and the property is not treated as being owned before it is converted to a rental property. I.R.S. Publication Number 534, *Depreciation* (Nov. 1987). Accordingly, if a soldier buys a home before 1986, but does not convert it to a rental property until after 1986, he must use the MACRS depreciation method. Major Ingold.

Forgiveness of Mortgage Indebtedness Is Income to Debtor

Taxpayers fortunate enough to have a mortgage company agree to accept less than the face amount of a mortgage may not be so happy after the IRS hears about the transaction. In two companion cases, the Tax Court has held that the forgiveness of mortgage indebtedness is income to the debtor. *William D. DiLaura,* 53 T.C.M. (CCH) 1077 (1987); *Milton E. Juister, Jr.,* 53 T.C.M. (CCH) 1079 (1987).

In both cases, the taxpayers received unsolicited letters from mortgage companies inviting them to reduce the amount due on their mortgages by paying the mortgages in full. The taxpayers accepted the offers and paid amounts that were less than the principal amounts then owed.

The central issue in both cases was whether the discharge of mortgage indebtedness was in the nature of a gift. Although the general rule is that gross income includes income from the discharge of indebtedness, an exception exists if the amount was received as a gift or bequest. I.R.C. § 61(a)(12) (West Supp. 1987).

The Tax Court noted that the United States Supreme Court previously applied the gift exception in the case of a corporate debtor. *Helvering v. American Dental Co.,* 318 U.S. 322 (1943). The Supreme Court subsequently adopted a "motive" test under which the presence or absence of donative intent is dispositive on the issue. *Commissioner v. Jacobson,* 318 U.S. 28 (1949).

In applying the motive test, the Tax Court found in both cases that the action by the mortgagees was taken for economic reasons; to rid themselves of low interest rate loans. Thus, the court held that each taxpayer must include the difference between the principal outstanding and the settlement amount as gross income for the year in which the transactions took place. The court also ruled in one of the cases that the fee paid for recording the mortgage cancellation was a nondeductible capital expenditure that must be added to the basis of the taxpayer's residence. Major Ingold.

Arkansas Supreme Court Upholds Pretermitted Heir Statute

The pretermitted heir statute in Arkansas provides that if a testator fails to mention a child or the issue of a deceased child, the child or issue will be entitled to recover their intestate share as if there had been no will. Ark. Stat. Ann. § 60–507(b) (1971). The constitutionality of the statute was recently challenged in *Holland v. Willis,* 239 Ark. 518, 739 S.W.2d 529 (1987).

In *Holland,* the testator executed a will leaving his entire estate to his nephew and naming him as executor. The testator specifically named and disinherited his daughter in that will. He did not, however, mention either a son who had predeceased him or the son's two children.

When the will was admitted to probate, the representative for the testator's grandchildren petitioned the court for a one-fourth share of the estate under the Arkansas pretermitted heir statute. The executor, and sole beneficiary, argued that the statue was unconstitutional as violating the due process, equal protection, and privileges and immunities clauses of the United States and Arkansas constitutions.

The executor's major challenge to the statute was that it creates an impermissible irrebutable presumption that precludes parties from introducing extrinsic evidence to show a testator's true intent. The court agreed that the statute would not allow extrinsic evidence to be introduced to show that a testator intended to disinherit a pretermitted heir, but nevertheless concluded that this does not automatically invalidate the statute.

The court also rejected the executor's claim that the statute denied due process because it prevented him from carrying out the provisions of the will. The court found instead that the statute rationally relates to legitimate state purpose; to avoid the inadvertent or unintentional omission of children or issue. The court noted that the statute does not require the testator to provide for his heirs. Rather, the testator must merely mention them either specifically or as a member of a class.

Although most jurisdictions have some type of pretermission statute, these laws vary greatly from state to state. Generally, most states follow the Arkansas approach by not ultimately limiting the power of disposal under a will and applying intestacy rules only when a child or descendant is not mentioned. 79 Am. Jur. 2d *Wills* § 642 (1987). It is not necessary under the laws in most states for the testator to specifically disinherit the child or descendant to avoid application of the statute. The Uniform Probate Code and the statutes in many states are unlike Arkansas law, however, in that they would allow extrinsic evidence of a testator's intention to disinherit a child or a descendant. Uniform Probate Code § 2–302; 79 Am. Jur. 2d *Wills* § 644 (1987). Major Ingold.

Award for Excellence in Legal Assistance for 1987

This note summarizes the major innovations and accomplishments of the offices selected to receive the Chief of Staff's Award for Excellence in Legal Assistance in 1987. This year, for the first time, winners were chosen in three separate categories: large office (15 or more attorneys), medium office (3 to 14 attorneys), and small office (1 or 2 attorneys).

There were two winners in the large office category in 1987: the XVIII Airborne Corps and Fort Bragg Legal Assistance Office and the 1st Armored Division Legal Assistance Office. One of the outstanding features of the XVIII Airborne Corps Legal Assistance Office was a dynamic tax assistance program. The office dedicated an entire building for centralized tax services and was the first military installation to file federal income tax returns electronically.

The XVIII Airborne Corps Legal Assistance Office took a proactive approach in helping soldiers by convincing the North Carolina legislature to pass legislation which permits soldiers to terminate leases upon receipt of military orders. In addition, the Corps expanded and upgraded its legal assistance offices in 1987 and, in an effort to improve efficiency, trained legal specialists and noncommissioned officers to perform paralegal duties. The Corps office was also very active in community affairs in 1987. Its members organized and presented community-wide activities to commemorate the Constitutional Bicentennial. The Office also assisted in establishing a County Dispute Resolution Center and participated as a charter member.

The co-recipient of the Award in the large office category, the 1st Armored Division Legal Assistance Office, also achieved success in several areas in 1987. The office prepared a series of television commercials on legal issues entitled "The Legalizer," which won the best commercial competition for Armed Forces Network (AFN)-Europe for 1987. The office also frequently used radio broadcasts to address timely legal issues and advertise the availability of legal assistance services. The legal assistance office conducted quarterly workshops to allow all legal assistance attorneys and the Staff Judge Advocate to share information, discuss common problems, and present formal classes on topics of interest to legal assistance attorneys.

A major initiative of the 1st Armored Division Legal Assistance Office in 1987 was the development of an arbitration program to resolve intra-American private disputes. The office successfully reduced waiting times for clients to see attorneys in 1987 by implementing a number of programs to improve office efficiency including standardizing and automating letters and documents. The Division also hired three local national attorneys to serve in the legal assistance office in 1987. These new German attorneys greatly enhanced the quality of legal services available to 1st Armored Division clients by providing broad assistance in host-nation affairs, including accompanying soldiers appearing pro se in German courts.

The winner of the medium-sized office award, the USA Berlin Legal Assistance Office, impressed judges on the selection committee with its innovative and comprehensive legal assistance program. Several initiatives helped to improve the tax assistance program in Berlin. Twice each month during the 1987 tax filing season, the office's members wrote a newsletter on tax issues and distributed copies to all unit tax assistors. The staff conducted a highly successful brigade-wide "1040EZ day" on 31 January and helped over 500 clients obtain social security numbers for dependents in 1987.

In an effort to make legal assistance service more readily available to soldiers, the Berlin Legal Assistance Office sent a "legal assistance van" to remote locations. Soldiers were

able to conveniently obtain basic legal services such as powers of attorney and notarizations from legal assistance personnel staffing the van. The office's members also created an arbitration program to help soldiers and dependents settle small disputes without court involvement, and represented indigent soldiers in Berlin District Court under an active expanded legal assistance program. In addition, the Berlin Office was also active in the preventive law area and created a weekly AFN-Europe radio program on a topic of local interest.

The Giessen branch legal assistance office, winner of the small office award, also has an active and innovative legal assistance program. Through an aggressive publicity program, the office staff was able to assist over 4,000 clients in preparing income tax returns. They improved its preventive law program by expanding the preventive law portion of soldiers' inprocessing briefings, providing comprehensive legal services to dependents during Non-combatant Evacuation Order Exercises, and offering free publications on legal and consumer related topics to clients in the community. The entire legal assistance office at Giessen was renovated in 1987 to improve its appearance and enhance client privacy. The office also was made more efficient by placing most of its standard letters and forms on computer.

Perhaps the most significant characteristic of the Giessen office, however, was the zealous representation of clients in a number of areas. For example, members of the office helped over eight soldiers sue a disreputable dealer who had misrepresented the worth and future appreciation of paintings. Similarly, an attorney at Giessen convinced a finance company to release 18 soldiers from liability on installment loan contracts for furniture sold to the soldiers but not delivered.

Although generalizations about the winners are difficult to make, all four programs featured energetic and innovative approaches to legal assistance. The winning offices demonstrated initiative in establishing sound tax assistance, preventive law, and alternative dispute resolution programs and a commitment to going the extra mile for their clients.

The judges on the selection committee were highly impressed with the quality of legal assistance provided by other commands that submitted nominations. All entries for the 1987 Award for Excellence in Legal Assistance are available for review at The Judge Advocate General's School. Major Ingold.

Claims Report

United States Army Claims Service

Proper Claimants Under the Personnel Claims Act

Robert A. Frezza
Personnel Claims and Recovery Division

Title 31, United States Code, Section 3721 [hereinafter "the Personnel Claims Act" or "the Act"],[1] is the basic authority for compensating soldiers and civilian employees for loss of or damage to personnel property incident to service. The Army processes over 85,000 such claims a year.[2] The Act is a gratuitous payment statute,[3] and Congress limited those persons who are entitled to compensation. Most claimants presenting personnel claims to an Army claims office are clearly either soldiers or civilian employees of the Army or the Department of Defense. On occasion, however, determining whether a particular person is a proper claimant presents a greater problem then determining whether the claim is meritorious.

Personnel claims presented by persons employed by other federal agencies may only be processed by that agency. Employees of other federal agencies should simply be assisted in presenting claims directly to their agency. Claims by personnel employed by other military services normally present difficulties only in distinguishing civilian employees working directly for the Department of Defense from civilian employees working for the Department of the Navy or the Department of the Air Force. Army claims offices accept claims from service members and civilian employees of the other military services and the U.S. Coast Guard, but these claims are merely forwarded to a claims office of that service for settlement.[4]

[1] Claims of Personnel of Agencies and the District of Columbia Government for Personal Property Damage or Loss, 31 U.S.C. § 3721 (1982), formerly known as "The Military Personnel and Civilian Employees Claims Act of 1964." The Act is implemented by Army Reg. 27-20, Legal Services—Claims, chap. 11 (10 July 1987) [hereinafter AR 27-20].

[2] U.S. Army Claims Service records show that 84,221 personnel claims were processed in fiscal year 1985, 104,615 in fiscal year 1986, and 87,607 in fiscal year 1987.

[3] *See* AR 27-20, para. 11-2a.

[4] AR 27-20, para. 11-3b. Although U.S. Army Claims Service has proposed that the military services adjudicate and pay small claims presented by personnel of other military services in remote areas, the consensus is that the statutory language does not permit this, and no statutory change has yet been initiated.

Paragraph 11–3 of Army Regulation 27–20 outlines the three classes of claimants that Army claims offices are authorized to compensate: soldiers on active duty; members of the Army Reserve or the Army National Guard engaged in active or inactive duty training; and civilian employees of the Army, the Army National Guard, and the Department of Defense. It also provides that agents of living proper claimants and certain survivors of deceased proper claimants may file claims. Claims by employees of Army nonappropriated fund instrumentalities for losses incident to their service are also received and processed by Army claims offices, but are paid from nonappropriated funds.[5]

Problems in distinguishing proper claimants arise in three contexts: claimants who are part of the military force but are not soldiers or civilian employees of the United States; claimants who are no longer soldiers or civilian employees or who only enjoy the status of being proper claimants "part-time" such as reserve component personnel; and claimants who are spouses or relatives of proper claimants.

Persons associated with the military forces who are not soldiers or civilian employees of the United States include persons employed by private entities, as well as independent contractors and foreign military personnel. Even though these persons are employed on the installation and are afforded some government support, often including shipment at government expense under a Government Bill of Lading,[6] they are not persons Congress intended to benefit. Red Cross personnel, United Services Organization (USO) personnel and contractors' employees, such as technical representatives, are other examples of persons who are not covered by the Act. Claims by persons employed by American universities overseas such as University of Maryland, Munich, and Central Texas College present particular problems, because these persons are rarely warned that they are not covered by the Act during shipment and often have a hazy notion of their exact contractual relationship.

Independent contractors, particularly those of nonappropriated fund instrumentalities, also present particular problems. Often, the line that distinguishes a contractor from a temporary employee is exceedingly fine. Generally, a person hired to complete a specific task is a contractor. One example of this would be a person hired by a nonappropriated fund instrumentality to teach an aerobics class. The local civilian personnel office is the final authority as to whether a person is an independent contractor or an employee of the United States. In some instances, a person working as an independent contractor may be a soldier or civilian employee or the spouse of a soldier or civilian employee. Losses occurring while a person is acting as an independent contractor would not be considered incident to service as a soldier or civilian employee and therefore are not compensable.[7]

Foreign military personnel are similarly not proper claimants, even while attending service schools or otherwise serving with American forces. For losses which do not involve negligence on the part of the United States, they should be directed to present claims to their own governments.[8] A British officer whose bicycle was stolen recently advanced the novel argument that the exchange agreement between the United States and the United Kingdom granted him the right to treatment as an American officer in all respects, including the right to present a claim for a loss incident to service. Even apart from the fact that he confused the duties of the Sending State with those of the Receiving State under the agreement, there is no statutory authority for such payments.[9]

While the entitlement to present a claim is based on the person's status at the time the claim accrued, a second area of concern is that of persons who are not proper claimants at the time of the loss. Reserve component personnel are only proper claimants for losses which occur while they are on active duty or inactive duty for training. Losses occurring during travel pursuant to orders to perform duty are cognizable whether the duty is performed for pay or for retirement points. Losses occurring during attendance at government-sponsored seminars or schools are considered incident to service even when the reservist is not entitled to receive pay or retirement points. ROTC cadets are proper claimants while travelling to or attending summer camp or a service school. Losses occurring between periods of duty, are not compensable. A loss of property that was stored in a vehicle in anticipation of a weekend drill would therefore not be compensable. Reserve component personnel are not proper claimants "full-time."

Although retirees are afforded numerous other benefits, they have no right to compensation under the Act.[10] Retirees and other persons leaving government service are not proper claimants for losses occurring after they have left, although they are still entitled to file claims for losses which occurred prior to that date. A person who is authorized a final shipment at government expense, however, is a proper claimant for a loss incurred during that final shipment, regardless of the actual date of the loss.[11]

By informal agreement among the military services, civilian employees transferring to another service, from the

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[5] AR 27–20, para. 11–3c.

[6] Pursuant to paragraph 11–2d of AR 27–20, claims by such persons for losses should be considered under other applicable chapters of the regulation prior to disapproval; however, claims for losses in shipment considered under the Military Claims Act, 10 U.S.C. § 2733 (1982), are almost invariably denied, inasmuch as employees of a common carrier cannot be considered agents of the United States.

[7] For example, the spouse of a soldier drives a vehicle on post to teach an aerobics class as an independent contractor or to work for the Red Cross. While the person is on the installation solely for that purpose, loss of or damage to the vehicle would not be incident to service and therefore not compensable.

[8] Claims by foreign military personnel are payable under the Military Claims Act or the Federal Tort Claims Act if there is negligence on the part of the United States. Torts—Foreign, Bulletin Number 7, U.S. Army Claims Service Claims Manual (22 July 1985).

[9] Absent negligence on the part of the United States, there is no statutory authority under any claims statute to pay foreign military personnel. For purely political reasons, claims by particular foreign military personnel might conceivably be paid from the Secretary of the Army's discretionary fund.

[10] If a retiree who is also a DA or DOD civilian employee suffers a loss while present on the installation by virtue of his or her status as a retiree, such as using the Post Exchange or the Commissary on a weekend, then the loss would not be incident to the retiree's federal civilian employment and would not be cognizable. *See also* note 7.

[11] *Cf.* Brabson v. U.S., 95 Ct. Cl. 187 (1941).

Army to the Navy for example, who present claims for losses incurred during government-sponsored shipment, will have their claims processed by the gaining service. Also by agreement among the military services, the claim of a Department of Defense Dependents School (DODDS) teacher is processed by the service operating the installation where the teacher is employed.[12] If the claim is presented by a DODDS teacher who is leaving DODDS employment, the claim should be processed by the service operating the installation where the teacher was last employed.

The issue of entitlement at the time the claim accrued also affects persons in the process of entering federal service. Persons who have not yet joined the Army are not proper claimants for losses which occur prior to enlistment, although as an exception to this general rule, persons who suffer losses at an enlistment center while being processed to enter the Army are deemed to be proper claimants even though the loss may have occurred prior to their taking the actual oath of enlistment.

Other persons who present the claims office with problems are family members of proper claimants. Family members of soldiers or civilian employees are not entitled to compensation, except as agents or survivors of proper claimants. For claims purposes, property belonging to family members is often deemed to belong to the proper claimant.[13] Because family members often consider the claim to be "theirs," rather than the soldier's, there are often difficulties, particularly when the soldier's interests differ markedly from the family member's.

An agent or legal representative of a proper claimant, including a spouse, may present a claim on behalf of the claimant if the agent has a power of attorney which complies with local law and specifically authorizes the agent to file a claim. In addition, a spouse may file on a proper claimant's behalf if the spouse has a written, signed authorization to do so from the claimant.[14] In all cases, the agent is presumed to be acting for the claimant. If the claimant is unavailable or unwilling to grant a spouse or other family member authority, the spouse may not present the claim as an agent.[15]

Frequently, the spouse acting as the agent is in the process of divorcing the proper claimant. When there is reason to question the agent's authority, it is essential that the claims office contact the proper claimant before paying the claim. In all cases, the payment should be made in the name of the proper claimant.[16]

In addition, certain relatives of a deceased proper claimant may file a claim that the claimant could have filed. Survivors are ranked in order, and a survivor must establish that he/she has priority to file the claim. The order of survivors is: spouse, child or children, father or mother, brothers or sisters. If there is more than one person in any level of the order, the first claim settled will extinguish the right of other persons in that class. The estate of a deceased proper party claimant is not a proper claimant, nor is an executor or personal representative who cannot otherwise file as a survivor.[17]

A final problem that often occurs is that there may be more than one proper claimant. This situation arises with borrowed property and with service members who are married to each other. In the case of borrowed property, as long as the loss is incident to service, both the owner of the property and the person who borrowed the item, would be proper claimants. Payment to one extinguishes the right of the other, so if the borrower files, the owner should be asked to consent in writing.

Similarly, when two soldiers are married and suffer a shipment or quarters loss, either could file a claim, regardless of whose name was used to ship the property or sign for the quarters. Payment to one will extinguish the right of the other, however, so both spouses should be asked to agree on how the claim will be paid before the claim is processed. In unusually acrimonious situations, payment on the claim might have to be delayed pending a divorce settlement.

In the foregoing situations, the apparently clear language authorizing Army claims offices to compensate soldiers and civilian employees of the Army and the Department of Defense becomes murky. Given the number of claims presented under the Personnel Claims Act yearly, it is surprising that such problems occur so infrequently. This web of exceptions reflects the emphasis of the statute and its implementing regulation on the prompt, fair disposition of claims of soldiers and civilian employees for losses incident to their service, in order to maintain morale and prevent financial hardship.[18] Viewed in this light, determining who is a proper claimant is surprisingly easy.

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[12] Personnel Claims, Bulletin Number 55, USARCS Claims Manual (1 Oct. 1985).

[13] If a claim by the proper claimant is meritorious under the Act, this is the family's exclusive remedy. *See* AR 27-20 para. 11-2d; *see also* Wallis v. U.S., 126 F. Supp. 673 (E.D.N.C. 1954).

[14] Personnel Claims, Bulletin Number 85, USARCS Claims Manual (1 Oct. 1985).

[15] Occasionally, a soldier will desert, leaving a spouse behind with no legal authority to present a claim. The harsh, but correct answer is that the spouse is not entitled to receive compensation which would otherwise be payable to the claimant.

[16] Even a spouse armed with a divorce decree awarding him or her the property has no independent right to present a claim.

[17] In listing a specific order of survivors who are permitted to present a claim in subsection h of the Act, Congress implicitly intended not to benefit more remote descendants or beneficiaries by allowing a claim by an executor or personal representative, or by the estate. The Air Force has taken a contrary view of the statutory language, however; *see* Air Force Reg. 112-1, Claims and Tort Litigation, para. 6-7c (1 July 1983). All Services agree that if a claim is presented by a proper claimant who dies before the claim is processed, payment would be made to the claimant's estate.

[18] AR 27-20, para. 11-9a.

Tort Claims Notes

Reimbursement of Fire Suppression Costs

Fire departments understandably desire compensation for the costs they incur fighting fires. These costs include labor costs, wear and tear on equipment, and costs of chemicals and equipment use fees. There are also state statutes which require landowners or persons responsible for setting a fire to reimburse these costs. Accordingly, a fire department will sometimes file a claim under the Federal Tort Claims Act (FTCA) or the Military Claims Act (MCA) for reimbursement of these costs incurred when fighting fires on a military installation.

Claims for fire suppression costs are not cognizable under either statute. Fire suppression costs are not "money damages . . . for injury or damage to personal property" under the FTCA. *Idaho ex rel. Trombley v. United States,* 666 F.2d 444 (9th Cir.), *cert. denied,* 459 U.S. 823 (1982). Such claims are not payable under the MCA, which contains similar language in 10 U.S.C. § 2733(a)(1).

The remedy for claims by public agencies is contained in the *Federal Fire Prevention and Control Act of 1974,* 15 U.S.C. § 2210, which allows limited reimbursement of the costs incurred by civilian fire fighting agencies as a result of fighting fires on property under federal jurisdiction. Claims are submitted to the Federal Emergency Management Agency (FEMA) for adjudication and payment. *See* AR 27–20, para. 13–6b. The FEMA claim alternative is preferable to ratification or small purchase procedures under the FAR.

Many installations have mutual support agreements with local fire fighting agencies. Claims personnel should review these agreements and ensure that they contain a provision referring to adjustment of fire suppression cost claims.

The exclusion of fire suppression costs under the FTCA and MCA applies only to agencies under a public duty to fight a fire. The costs a private landowner expends in fighting a fire which starts on federal property and spreads to his land may be compensable as consequential damages. If a landowner attempts to claim reimbursement for a bill from a local fire department for fire suppression costs, always determine whether the landowner is in fact liable for the cost of fighting the fire, and why he is liable. If the landowner is liable for fire suppression costs, it may be due to contributory negligence (such as failure to maintain firebreaks).

Foreign Medical Malpractice Claims

Claims offices within the Continental United States (CONUS) receiving claims which allege injuries as the result of medical malpractice committed in a military medical facility located outside the United States should immediately contact the Medical Malpractice Branch of the U.S. Army Claims Service (USARCS), Fort Meade, Maryland. Point of contact for these claims is Ms. Marilyn C. Byczek, Attorney Advisor. The telephone number is AUTOVON 923–7803/7804/7854/5706.

Medical malpractice claims arising outside the United States are administratively processed under the provisions of the Military Claims Act, 10 U.S.C. § 2733, and its implementing regulation within the Department of the Army, AR 27–20, Chapter 3. A copy of the claim form received by the CONUS claims office should be promptly forwarded to USARCS, ATTN: Ms. Byczek, along with a copy of any and all outpatient or inpatient medical records relating to the claimant which are either maintained by the local military treatment facility or within the claimant's possession. A decision will then be made by USARCS regarding transfer of responsibility for the claim from the claims office receiving the claim to either USARCS or to an overseas claims office. However, the claims office receiving the claim should anticipate requests for information and assistance on these claims even after they are transferred on paper to USARCS, etc., particularly if the claimant resides within the geographical jurisdiction of the CONUS claims office.

Personnel Claims Notes

Deductions for Lost Potential Carrier Recovery

The following information was sent to all claims offices by electrical message on April 7, 1988. Because of its importance, the message is republished here.

SUBJECT: DEDUCTIONS FOR LOST POTENTIAL CARRIER RECOVERY ON INCREASED RELEASED VALUATION CLAIMS

1. WHEN THE CLAIMANT FAILS TO PROVIDE TIMELY NOTICE USING THE DD FORM 1840/1840R AND COSTS THE GOVERNMENT ITS POTENTIAL CARRIER RECOVERY (PCR), A DEDUCTION IS APPROPRIATE ABSENT GOOD CAUSE. SEE PARA 11–21, AR 27–20. IN SUCH CASES THE CLAIMS FILE MUST REFLECT THAT THE CLAIMS OFFICE CONTACTED THE CLAIMANT, PREFERABLY IN WRITING, TO DETERMINE THE CLAIMANT'S REASONS FOR FAILING TO COMPLY.

2. ON ALL CLAIMS RECEIVED BY A CLAIMS OFFICE AFTER 1 JULY 1988, WHENEVER A DEDUCTION FOR LOST PCR IS APPROPRIATE, THE FULL AMOUNT—REPEAT FULL AMOUNT—THAT COULD HAVE BEEN RECOVERED FROM THE CARRIER (OR WAREHOUSE FIRM) WILL BE DEDUCTED ON AN ITEM BY ITEM BASIS. FORMERLY, ONLY 50% OF THE RECOVERY LOST WAS DEDUCTED ON INCREASED RELEASED VALUATION SHIPMENTS DURING A TRANSITION PERIOD. ALL THE MILITARY SERVICES HAVE NOW AGREED TO 100% DEDUCTIONS ON ALL SHIPMENTS.

3. FOR MANY CLAIMANTS, FAILURE TO PROVIDE TIMELY NOTICE WILL COST THEM THEIR ENTIRE CLAIM. CLAIMS OFFICES SHOULD PUBLICIZE THIS FACT WIDELY. FOR CLAIMS FILED PRIOR TO 1 JULY 1988 INVOLVING INCREASED RELEASED VALUATION, 50% DEDUCTIONS FOR LOST PCR WILL CONTINUE TO BE APPLIED IAW PC BULLETIN 96, 28 APRIL 1987.

4. PASS A COPY OF THIS MSG TO YOUR TRANSPORTATION OFFICER FOR USE IN PREMOVE BRIEFINGS.

5. PC BULLETIN 96 WILL BE REVISED TO REFLECT THIS POLICY IN CHANGE 8 TO THE CLAIMS MANUAL. POC IS CPT GILMORE, (301) 677-3226 OR AV 923-3226.

Matching Discontinued China and Crystal

Pieces of china and crystal are often broken during the shipment of household goods, and many claimants have difficulty obtaining replacement pieces. Often, a claimant will request replacement of the entire set. The ideal solution is to be able to direct the claimant to a firm which can replace those pieces which are broken.

A number of firms specialize in matching discontinued china and crystal patterns. Replacements, Ltd., 302 Gallimore Dairy Road, Greensboro, NC 27409-9723, TEL: (919) 668-2064, offers both replacement china and crystal pieces. Jacquelynn's China Matching Service, 219 N. Milwaukee Street, Milwaukee, WI 53202, TEL: (414) 272-8880, specializes in replacing Coalport, Franciscan, Minton, Royal Doulton, Royal Worcester, Spode, and Wedgwood china.

Information for this note was provided by Melanie Taber at Watervliet Arsenal. Our thanks to her. Personnel who are aware of other such firms are encouraged to provide this information to USARCS, ATTN: JACS-PC (Mr. Frezza).

Courtesy

This note concerns courtesy. Courtesy displayed by those who provide claims services to the military community must be maintained at a high level. Evaluation of a Staff Judge Advocate's concern for customers is strongly influenced by the social attitudes exhibited at service-type facilities. Where there is daily contact between people providing services and an even larger number of people being served, courtesy must pervade every facet of the activity. It is just as important to give a courteous explanation for a delay to an Army spouse waiting in line as it is to the soldier waiting to process a claim. An attitude that "the customer is always right" will set the tone that those serving are truly trying to meet the desires of those being served. The little extra effort to assure courtesy will be repaid to us many times over in improved morale. At all times, the courtesy and interest displayed by claims personnel should be at least equal to the courtesy and interest one desires and expects when receiving similar service. Speak to people when they enter the office for service. There is nothing as nice as a cheerful word of greeting. It doesn't do any harm to smile and say "Good Morning," even if it is raining. Be considerate and thoughtful of the opinions of claimants and be alert in giving service. We know that having lost or damaged property is a bad experience and we should not take the other person's irritability too seriously. Remember that "getting along" depends almost entirely on those providing the service. The principles of courtesy and customer respect cannot be overemphasized and should be observed as the point of reference for all customer transactions or services regardless of the circumstances.

Criminal Law Note

Criminal Law Division, OTJAG

Post-Trial Responsibilities

The U.S. Army Court of Military Review has recently experienced an increasing number of cases in which either (a) the staff judge advocate failed to respond to legal errors submitted in post-trial submissions by defense counsel, or (b) the defense counsel failed to notify the convening authority of the military judge's recommendation that all or part of the adjudged sentence be suspended, or of another clemency recommendation made by the military judge. The latter error is usually alleged as an issue of ineffective assistance of counsel.

Staff judge advocates should ensure that all post-trial submissions by the defense are scrutinized for allegations of legal error. Pursuant to R.C.M. 1105(b), an accused has the right to submit "to the convening authority any written matters which reasonably may tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence." Such matters may include allegations of error which affect the legality of the findings or sentence. When such allegations of legal error are submitted and a post-trial recommendation is required under R.C.M. 1106, then the staff judge advocate has an obligation under R.C.M. 1106(d)(4) to advise the convening authority whether corrective action should be taken. If such errors are raised in the defense counsel's response to the post-trial recommendation, the staff judge advocate should, pursuant to R.C.M. 1106(f)(7), prepare an addendum to the recommendation stating whether corrective action should be taken.

The drafters of the Manual for Courts-Martial, United States, 1984, specifically intended to shift the responsibility for bringing favorable information to the convening authority from staff judge advocates to the defense counsel (R.C.M. 1105(b) analysis). In *United States v. Davis*, 20 M.J. 1015 (A.C.M.R. 1985), the court agreed with this shift in responsibility, but held that a defense counsel's failure to apprise the convening authority of the military judge's recommendation to suspend a portion of the sentence constituted ineffective assistance of counsel. In such cases, the court typically returns the record for both a new review and action. Although it may be argued that the Army Court of Review is returning the record without taking full advantage of its powers to take corrective action, prudent

staff judge advocates could easily remedy the defense counsel's failure to comment on a military judge's clemency recommendation. As a matter of policy, staff judge advocates should include any type of suspension or clemency recommendation made by military judges or commanders in their post-trial recommendations. Staff judge advocates are reminded that although it is the defense counsel's error that may necessitate a new recommendation and action, staff judge advocates are the ones who must prepare new recommendations and actions when records are returned for corrective action.

Although convening authorities are not required to review cases for legal error or factual sufficiency, staff judge advocates should ensure that any appropriate corrective action which may be necessary to avoid the needless waste of appellate court time and resources is taken at the convening authority level. In summary, staff judge advocates should adopt as a guide in the area of post-trial responsibilities the often stated trial counsel responsibility of protecting the record.

Warrant Officer and Enlisted Specialty Training Update

CW4 Calvin R. Haynes
Correspondence Course Officer, TJAGSA

Resident Instruction Program

The resident program administered by The Judge Advocate General's School offers three courses for active Army and Reserve Component warrant officers (PMOS 550A) and legal noncommissioned officers in grade E–5 and above with a PMOS of either 71D or 71E. Beginning in Academic Year 89–90, The Judge Advocate General's School will provide the facilities and support for all warrant officer (except active duty WOC technical certification) and enlisted specialty training (except AIT, BNCOC, and ANCOC) here at the Regimental Headquarters. Resident course descriptions and prerequisites for attendance appear below:

Law for Legal Noncommissioned Officers Course

The Law for Legal Noncommissioned Officers Course (512–71D/E/20/30) focuses on Army legal practice, with emphasis on the client service aspects of administrative and criminal law. This course builds on the prerequisite foundation of field experience and correspondence course study.

Purpose: To provide essential training for legal noncommissioned officers who work as professional assistants to judge advocates. The course is specifically designed to meet the needs of skill level three training.

Prerequisites: Active Army and Reserve Component soldiers in the grade of E–5 and E–6 with a primary MOS of 71D or 71E, who are working in a military legal office, or whose immediate future assignment entails providing assistance to an Army attorney. Students must have served a minimum of one year in a legal position and must have satisfactorily completed the Law for Legal Specialists Correspondence Course not less than sixty days before the starting date of the course.

Chief Legal Noncommissioned Officer and Senior Court Reporter Management Course

The Chief Legal NCO and Senior Court Reporter Management Course (512–71D/E/40/50) focuses on management theory and practice including leadership, leadership styles, motivation, and organizational design. Various law office management techniques are discussed, including the management of military and civilian personnel, equipment, law library, office actions and procedures, budget, and manpower.

Purpose: To provide increased knowledge of the administrative operations of an Army staff judge advocate office and to provide advanced concepts of effective law office management to legal noncommissioned officers. The course is specifically designed to meet the needs of skill level four and five training.

Prerequisites: Active Army or Reserve Component senior noncommissioned officer in the grade of E–7 through E–9 with a primary MOS of 71D or 71E who is currently serving as an NCOIC or whose immediate future assignment is as an NCOIC of a staff judge advocate branch office, or as a Chief Legal NCO of an installation, division, corps, or MACOM staff judge advocate office. Legal noncommissioned officers are selected for attendance by The Judge Advocate General's Corps Sergeant Major.

Legal Administrator Course

The Legal Administrator Course (7A–550A) focuses on the technical aspects of legal office administration and paralegal functions associated with administrative support services. Starting in 1989 this course will be held every two years. The Legal Administrator Course will be held at HQ, FORSCOM during the 2d quarter FY 89.

Purpose: To provide continuing training in and technical knowledge of the duties and responsibilities of legal administrators with emphasis on law office management, communications and military subjects (including budget, manpower, and information management).

Prerequisite: Active Army or Reserve Component warrant officers with primary MOS 550A.

Senior/Master Warrant Officer Technical Certification Course

The Senior/Master Warrant Officer Technical Certification Course (7A–550A) focuses on various managerial subjects to enhance individual technical skills as legal administrators and staff officers. The Technical Certification

requirement is that 100 percent of all warrant officers complete this course. Starting in 1990 this course will be held every two years. The Program of Instruction is currently being developed.

Purpose: To prepare selected individuals for successful performance of duties in the most demanding positions within the Legal Administrator career field.

Prerequisite: Active Army or Reserve Component Chief Warrant Officers in the grade of CW3 or above with a primary MOS 550A. Chief Warrant Officers are selected for attendance by the Specialty Manager, Office of The Judge Advocate General.

Nonresident Instruction Program

The nonresident course program administered by The Judge Advocate General's School includes four courses that are available for warrant officers, legal specialists and legal noncommissioned officers, and civilian employees. Correspondence Course descriptions and prerequisites for enrollment appear below:

Law for Legal Specialists Course

The Law for Legal Specialists Correspondence Course consists of basic material in the areas of legal research, criminal law, and organization of a staff judge advocate office.

Purpose: To provide legal specialists with substantive legal knowledge for performing duties as a lawyer's assistant and to provide a foundation for resident instruction in the Law for Legal Noncommissioned Officers Course.

Prerequisites: Enlisted soldiers in grade E–5 or below who have a primary MOS of 71D or 71E (and military members of other services with equivalent specialties) or civilian employees working in a military legal office.

Course content: 3 subcourses, total credit hours: 18. Students must complete the entire course within one year from the date of enrollment.

Administration and Law for Legal Noncommissioned Officers

The Administration and Law for Legal Noncommissioned Officers Correspondence Course covers basic and advanced material in the areas of legal research, military personnel law, claims, legal assistance, staff judge advocate operations, standards of conduct, professional responsibility, and selected military common skill subjects.

Purpose: To prepare legal noncommissioned officers to perform or to improve technical skills in performing their duties.

Prerequisites: Enlisted soldiers in grade E–6 or above who have a primary MOS of 71D or 71E. Soldiers in grade E–5 or below who have completed the Law for Legal Specialists Correspondence Course are eligible to enroll in this course. Military members of other services with equivalent specialties are eligible for enrollment. Civilian employees are not eligible for this course.

Course content: 13 subcourses, total credit hours: 78. Students must complete the entire course within one year from the date of enrollment.

Army Legal Office Administration

The Army Legal Office Administration Correspondence Course covers advanced material in civilian personnel law, the law of federal employment, trial procedure (including pretrial and post-trial), and technical common military subjects.

Purpose: To prepare junior and senior noncommissioned officers to perform or to improve their proficiency in performing the duties of Army Legal Office Administration.

Prerequisites: Enlisted soldiers in grade E–6 or above who have a primary MOS of 71D or 71E and who have completed the Administration and Law for Legal Noncommissioned Officers Correspondence Course. Members of other branches of service and civilian employees are not eligible for this course.

Course content: 16 subcourses, total credit hours: 179. Students must complete 80 credit hours the first year to maintain enrollment and complete the entire course within two years from date of enrollment.

Military Paralegal Program

The Military Paralegal Program is designed to provide highly technical training that will enable soldiers to perform specialized functions closely related to, but beyond, the normal scope of their duties. The program is a combination of resident and correspondence course studies.

Purpose: To provide Judge Advocate General's Corps warrant officers and noncommissioned officers with the substantive legal knowledge needed to improve proficiency in performing military paralegal duties in criminal law, administrative and civil law, legal assistance, and contract law.

Prerequisites: (1) Applicant must be an Active Army or Reserve Component warrant officer (PMOS 550A), or legal noncommissioned officer in grade E–5 or above who has a primary MOS of 71D or 71E. Applicant must have been awarded primary MOS 550A, 71D or 71E a minimum of three years prior to date of applicant for enrollment. MOS 550A and 71E may include prior awarding of MOS 71D or 71E when calculating the three year period. Members of other services and civilian employees are not eligible for enrollment in the program at this time.

(2) Applicant must have completed a minimum of two years of college (60 semester credit hours).

(3) Applicant must have completed or received equivalent credit for specialized legal and technical training consisting of a combination of both resident and correspondence courses.

Resident Requirements

Applicant must have successfully completed the Legal Specialists Entry Course or Legal Specialists Entry Course (Reserve Component); and either the Law for Legal Noncommissioned Officers Course or the Legal Administrators Course.

Correspondence Course Requirements

Applicant must have successfully completed the Law for Legal Specialists Course; and the Administration and Law

for Legal Noncommissioned Officers Course or the Army Legal Office Administration Course.

Program content: 13 subcourses, total credit hours: 81. Student must complete the entire program within two years from the date of enrollment.

Enrollment Procedures: Applicants for enrollment in the program will complete DA Form 145, Army Correspondence Course Enrollment Application. The DA Form 145 will then be submitted to the appropriate approval authority for comment as indicated in the May 1988 edition of *The Army Lawyer.*

Independent Instruction Program

Independent enrollment is available in selected subcourses. An applicant who does not meet the eligibility requirements for enrollment in one of the judge advocate correspondence courses or who wishes to take only selected subcourses may enroll in specific subcourses provided the applicant's duties require the training that may be accomplished by means of such subcourses. Enrollment as an independent student requires that the student complete thirty credit hours per enrollment year or the individual subcourse, whichever is less. Selected subcourse titles for enlisted speciality skill development appear below:

JA 02 Standards of Conduct and Professional Responsibility
JA 22 Military Personnel Law and Boards of Officers
JA 23 Civilian Personnel Law and Labor-Management Relations
JA 25 Claims
JA 26 Legal Assistance
JA 36 Fundamentals of Military Criminal Law and Procedure
JA 128 Claims
JA 129 Legal Assistance Programs, Administration, and Selected Problems
JA 130 Nonjudicial Punishment
JA 133 Pretrial Procedure
JA 134 Trial Procedure
JA 135 Post-trial Procedure

Additional Information

The TJAGSA Academic Year 88–89 Annual Bulletin will be available later this year.

If you have any questions or need further information about correspondence course studies administered by The Judge Advocate General's School, call the TJAGSA Correspondence Course Office at (804) 972–6308; or AUTOVON 274–7110, and ask for the commercial number; or for calls outside the state of Virginia, use the toll free number 1–800–654–5914, and ask for extension 308.

Guard and Reserve Affairs Item

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

The Judge Advocate General's School Continuing Legal Education (On-Site) Training

The following schedule sets forth the training sites, dates, subjects, and local actions officers for The Judge Advocate General's School Continuing Legal Education (On-Site) Training program for Academic Year (AY) 1989. The Judge Advocate General has directed that all Reserve Component judge advocates assigned to The Judge Advocate General Service Organizations (JAGSOs) or to judge advocate sections of USAR and ARNG troop program units attend the training in their geographical area (AR 135–316). All other judge advocates (Active, Reserve, National Guard, and other services) are strongly encouraged to attend the training sessions in their areas. The On-Site program features instructors from The Judge Advocate General's School, U.S. Army (TJAGSA), and has been approved for continuing legal education (CLE) credit in several states. Some On-Sites are co-sponsored by other organizations, such as the Federal Bar Association, and include instruction by local attorneys. The civilian bar is invited and encouraged to attend On-Site training.

Action officers are required to coordinate with all Reserve Component units in their geographical area that have assigned judge advocates. Invitations will be issued to staff judge advocates of nearby active armed forces installations. Action officers will notify all members of the Individual Ready Reserve (IRR) that the training will occur in their geographical area. Limited funding from ARPERCEN is available, on a case by case basis, for IRR members to attend On-Sites in an ADT status. Applications for ADT should be submitted 8 to 10 weeks prior to the scheduled On-Site to Commander, ARPERCEN, ATTN: DARP-OPS-JA (Maj Kellum), 9700 Page Boulevard, St. Louis, MO 63132–5260. Members of the IRR may also attend for retirement point credit pursuant to AR 140–185. These actions provide maximum opportunity for interested JAGC officers to take advantage of this training.

Whenever possible, action officers will arrange legal specialists/NCO and court reporter training to run concurrently with On-Site training. In the past, enlisted training programs have featured Reserve Component JAGC officers and noncommissioned officers as instructors as well as active duty staff judge advocates and instructors from the Army legal clerk's school at Fort Benjamin Harrison. A model training plan for enlisted soldier On-Sites has

been distributed to assist in planning and conducting this training.

JAGSO detachment commanders and SJAs of other Reserve Component troop program units will ensure that unit training schedules reflect the scheduled On-Site training. Attendance may be scheduled as RST (regularly scheduled training), as ET (equivalent training), or on manday spaces. It is recognized that many units providing mutual support to active armed forces installations may have to notify the SJA of that installation that mutual support will not be provided on the day(s) of instruction.

Questions concerning the On-Site instructional program should be directed to the appropriate action officer at the local level. Problems that cannot be resolved by the action officer or the unit commander should be directed to Major Mike Chiaparas, Chief, Unit Training and Liaison Office, Guard and Reserve Affairs Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903–1781 (telephone 804/972–6380).

The Judge Advocate General's School Continuing Legal Education (On-Site) Training, AY 89

Date	City, Host Unit and Training Site	Subject	Action Officer
24 Sep 88	Honolulu, HI IX Corps (Aug) Kolani Center Fort DeRussey, HI	Adm & Civ Law Criminal Law RC GO	MAJ Joseph Lee HQ IX Corps (Reinf) 2058 Maluhia Road Fort DeRussey, HI 98165 (808) 527–6453 or (808) 623–8384
1, 2 Oct 88	Minneapolis, MN 214th MLC Thunderbird Motel 2201 E. 78th Street Bloomington, MN 55420	Contract Law Crim Law GRA Rep RC GO	MAJ Jack Elmquist Bldg. 505, Fort Snelling St. Paul, MN 55111–4066 (612) 725–5256 or (612) 633–7612
22, 23 Oct 88	Boston, MA 94th ARCOM Hanscom AFB Bedford, MA	Int'l Law Contract Law GRA Rep RC GO	COL Paul L. Cummings HQ, 94th ARCOM AFRC, Bldg 1607 Hanscom AFB, MA 01731–5290 (617) 277–1991
22–23 Oct 88	Philadelphia, PA 153d MLC Willow Grove NAS Willow Grove, PA 19090	Criminal Law Adm & Civ Law GRA Rep RC GO	LTC Charles C. Freyer 3800 Centre Square West Philadelphia, PA 19102 (215) 972–7766 or (215) 884–0902
29, 30 Oct 88	St. Louis, MO 102d ARCOM TBD St. Louis, MO	Adm & Civ Law Int'l Law GRA Rep RC GO	LTC Gary Cooper 2557 Trossock Lane St. Louis, MO 63122 (314) 425–5131
12 Nov 88	Detroit, MI 123d ARCOM Poxon Reserve Center Southfield, MI	Int'l Law Adm & Civ Law GRA Rep RC GO	LTC Michael L. Updike 6061 Venice Drive Union Lake, MI 48085–1941 (313) 851–9500, Ext. 477
13 Nov 88	Indianapolis, IN 123d ARCOM Gates–Lord Hall Ft. Benjamin Harrison, IN	Int'l Law Adm & Civ Law GRA Rep RC GO	MAJ(P) John Joyce 10404 Stormhaven Way Indianapolis, IN 46256 (317) 637–5353 or (317) 841–8506
19, 20 Nov 88	New York, NY TBD	Contract Law Int'l Law GRA Rep RC GO	LTC Anthony Benedict 1 Eileen Court Suffern, NY 10901 (914) 698–9300 or (914) 357–4290
7, 8 Jan 89	Los Angeles, CA 78th MLC Marina Del Rey Marriot Marina Del Rey, CA 90291	Criminal Law Adm & Civ Law GRA Rep RC GO	LTC Michael Magasin 4910 Maytime Lane Culver City, CA 90230 (213) 398–6227 or (213) 559–3642
28, 29 Jan 89	Seattle, WA 124th ARCOM 6th MLC University of	Int'l Law Adm & Civ Law GRA Rep RC GO	LTC Robert Burke 3300 Columbia Center 701 Fifth Avenue Seattle, WA 98104–7007

The Judge Advocate General's School Continuing Legal Education (On-Site) Training, AY 89—Continued

Date	City, Host Unit and Training Site	Subject	Action Officer
	Washington School of Law Seattle, WA		(206) 623–3427 or (206) 842–8182
11, 12 Feb 89	Atlanta, GA 81st ARCOM TBD	Contract Law Int'l Law GRA Rep RC GO	MAJ Michael D. Anderson 81st ARCOM 2323 Dauphine Street East Point, GA 30344–2503 (404) 478–8868
25, 26 Feb 89	Denver, CO 96th ARCOM TBD	Contract Law Int'l Law GRA Rep RC GO	LTC Richard W. Breithaupt Boettcher Bldg DTC Suite 240 8400 East Prentice Avenue Englewood, Colorado 80111 (303) 793–3100
25, 26 Feb 89	Washington, DC 10th MLC Humphreys Hall Fort Belvoir, VA	Contract Law Int'l Law GRA Rep RC GO	CPT David W. LaCroix 113 Grantham Court Walkersville, MD 21793 (202) 325–9081/9082
4, 5 Mar 89	Columbia, SC 120th ARCOM University of South Carolina Law School Columbia, SC	Adm & Civ Law Criminal Law GRA Rep RC GO	MAJ Edward J. Hamilton, Jr. 1707 Quail Valley East Columbia, SC 29212 (803) 765–3227 or (803) 749–1635
11, 12 Mar 89	Kansas City, MO 89th ARCOM TBD	Criminal Law Adm & Civ Law GRA Rep RC GO	LTC Daniel J. Duffy 615 Fairacres Road Omaha, NE 68132 (402) 390–0300
18, 19 Mar 89	San Antonio, TX 90th ARCOM HQS, 90th ARCOM 1920 Harry Wurzbach Highway San Antonio, TX	Adm & Civ Law Contract Law GRA Rep RC GO	MAJ Michael D. Bowles 7303 Blanco Road, Suite 102 San Antonio, TX 78216 (512) 377–0008 or (512) 656–2602
18, 19 Mar 89	San Francisco, CA 5th MLC 6th Army Conf. Room Presidio of San Francisco	Adm & Civ Law Criminal Law GRA Rep RC GO	LTC David L. Schreck 50 Westwood Drive Kentfield, CA 94904 (415) 557–3030 or (415) 461–3053
25, 26 Mar 89	Louisville, KY 139th MLC Ramada Inn, Blue Grass Convention Center Louisville, KY	Adm & Civ Law Criminal Law GRA Rep RC GO	LTC James H. Barr 218 Choctaw Road Louisville, KY 40207 (502) 582–5911 FTS 352–5911
22, 23 Apr 89	Chicago, IL 86th ARCOM/7th MLC USAREC Conference Room Bldg. 48F Fort Sheridan, IL	Contract Law Int'l Law GRA Rep RC GO	COL Gary L. Vanderhoof 7402 W. Roosevelt Road Forest Park, IL 60130–2587 (312) 366–4178 or (312) 353–3862
29, 30 Apr 89	New Orleans, LA 2d JAG Detachment Sheraton New Orleans Hotel 500 Canal Street New Orleans, LA 70130 (504) 525–2500	Contract Law Criminal Law GRA Rep RC GO	LTC John C. Hawkins, Jr. P. O. Box 5969 Texarkana, TX 75505 (214) 792–8631 or (214) 798–3006
6, 7 May 89	Columbus, OH 9th MLC Defense Construction Supply Center (DCSC) Columbus, OH	Adm & Civ Law Contract Law GRA Rep RC GO	MAJ Dana McCue 3671 Carnforth Drive Hilliard, OH 43026 (614) 466–2118 or (614) 771–0572

The Judge Advocate General's School Continuing Legal Education (On-Site) Training, AY 89—Continued

Date	City, Host Unit and Training Site	Subject	Action Officer
6, 7 May 89	Birmingham, AL 121st ARCOM Cumberland School of Law, Samford University Birmingham, AL	Criminal Law Int'l Law GRA Rep RC GO	MAJ William D. Hasty, Jr. P. O. Box 2784 Birmingham, AL 35202–2784 (205) 942–7649 or (205) 822–4075
9, 10 May 89	San Juan, PR 7581st USAG Fort Buchanan, PR 00934 TBD	Criminal Law Int'l Law GRA Rep RC GO	MAJ Harold Glanville Valle Real AF–28 Ponce, PR 00731 (809) 843–7676 (809) 848–0553

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP–OPS–JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903–1781 (Telephone: AUTOVON 274–7110, extension 972–6307; commercial phone: (804) 972–6307).

2. TJAGSA CLE Course Schedule

1988

August 1–5: 95th Senior Officers Legal Orientation Course (5F–F1).

August 1–May 19, 1989: 37th Graduate Course (5–27–C22).

August 15–19: 12th Criminal Law New Developments Course (5F–F35).

September 12–16: 6th Contract Claims, Litigation, and Remedies Course (5F–F13).

September 26–30: 10th Legal Aspects of Terrorism Course (5F–F43).

October 4–7: 1988 JAG's Annual CLE Training Program.

October 17–21: 8th Commercial Activities Prog. Course (5F–F16).

October 17–December 21: 117th Basic Course (5–27–C20).

October 24–28: 21st Criminal Trial Advocacy Course (5F–F32).

October 31–November 4: 96th Senior Officers Legal Orientation (5F–F1).

October 31–November 4: 40th Law of War Workshop (5F–F42).

November 7–10: 2d Procurement Fraud Course (5F–F36).

November 14–18: 27th Fiscal Law Course (5F–F12).

November 28–December 2: 23rd Legal Assistance Course (5F–F23).

December 5–9: 4th Judge Advocate & Military Operations Seminar (5F–F47).

December 12–16: 34th Federal Labor Relations Course (5F–F22).

1989

January 9–13: 1989 Government Contract Law Symposium (5F–F11).

January 17–March 24: 118th Basic Course (5–27–C20).

January 30–February 3: 97th Senior Officers Legal Orientation (5F–F1).

February 6–10: 22d Criminal Trial Advocacy Course (5F–F32).

February 13–17: 2d Program Managers' Attorneys Course (5F–F19).

February 27–March 10: 117th Contract Attorneys Course (5F–F10).

March 13–17: 41st Law of War Workshop (5F–F42).

March 13–17: 13th Admin Law for Military Installations Course (5F–F24).

March 27–31: 24th Legal Assistance Course (5F–F23).

April 3–7: 5th Judge Advocate & Military Operations Seminar (5F–F47).

April 3–7: 4th Advanced Acquisition Course (5F–F17).

April 11–14: JA Reserve Component Workshop.

April 17–21: 98th Senior Officers Legal Orientation (5F–F1).

April 24–28: 7th Federal Litigation Course (5F–F29).

May 1–12: 118th Contract Attorneys Course (5F–F10).

May 15–19: 35th Federal Labor Relations Course (5F–F22).

May 22–26: 2d Advanced Installation Contracting Course (5F–F18).

May 22–June 9: 32d Military Judge Course (5F–F33).

June 5–9: 99th Senior Officers Legal Orientation (5F–F1).

June 12–16: 19th Staff Judge Advocate Course (5F–F52).
June 12–16: 5th SJA Spouses' Course.
June 12–16: 28th Fiscal Law Course (5F–F12).
June 19–30: JATT Team Training.
June 19–30: JAOAC (Phase II).
July 10–14: U.S. Army Claims Service Training Seminar.
July 12–14: 20th Methods of Instruction Course.
July 17–19: Professional Recruiting Training Seminar.
July 17–21: 42d Law of War Workshop (5F–F42).
July 24–August 4: 119th Contract Attorneys Course (5F–F10).
July 24–September 27: 119th Basic Course (5–27–C20).
July 31–May 18, 1990: 38th Graduate Course (5–27–C22).
August 7–11: Chief Legal NCO/Senior Court Reporter Management Course (512–71D/71E/40/50).
August 14–18: 13th Criminal Law New Developments Course, (5F–F35).
September 11–15: 7th Contract Claims, Litigation and Remedies Course (5F–F13).

Note—The 1988 Judge Advocate General's Annual Continuing Legal Education Training Program will be held from 4–7 October 1988. Attendance is by invitation only. Invitations will be mailed on or about 12 August 1988. It is important that course nominees notify TJAGSA of their intention to attend by the suspense date set in the invitation. The course manager is Captain Everett Maynard, Jr., (ATTN JAGS–SSJ). He can be reached at 1–800–654–5914 ext 322.

3. Army Sponsored Continuing Legal Education Calendar (1 July 1988–31 December 1988)

The following is a schedule of Army Sponsored Continuing Legal Education, not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697–3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972–6380; Trial Judiciary, (703) 756–1795; Trial Counsel Assistance Program (TCAP), (202) 756–1804; U.S. Army Trial Defense Service (TDS), (202) 756–1390; U.S. Army Claims Service, (301) 677–7804; Office of the Judge Advocate, U.S. Army Europe, & Seventh Army (POC: CPT Duncan, Heidelberg Military 8930). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: MAJ Williams, TJAGSA, (804) 972–6342.

Training	Location	Date
TCAP Seminar	Fort Meade, MD	19–20 July 1988
TCAP Seminar	Atlanta, GA	28–29 July 1988
TDS Workshop (Region IV)	Fort Sam Houston, TX	July 1988
USAREUR OIC/CJA Orientation	Heidelberg, Germany	5 Aug 1988
USAREUR SJA Training Seminar	Heidelberg, Germany	18–19 Aug 1988
TCAP Seminar	Kansas City, MO	7–8 Sept 1988
Tri-Service Judges Conference	Garmisch, Germany	11–16 Sept 1988
TDS Workshop (Region II)	Fort Benning, GA	14–16 Sept 1988
TDS Workshop (Region I & III)	Fort Leavenworth, KS	15–17 Sept 1988
TDS Workshop (Region V)	Fort Lewis, WA	24–26 Sept 1988
TDS Workshop (Region VI)	Yongsan, Korea	September 1988
USAREUR NAF Training Seminar	Heidelberg, Germany	September 1988
WESTPAC CLE Program	Honolulu, Hawaii	16–17 Sept 1988
	Manila, Philippines	21–22 Sept 1988
	Okinawa	24–26 Sept 1988
	Japan	28–29 Sept 1988
	Korea	3–4 Oct 1988
USAREUR Criminal Law Workshops Workshops and Advocacy Course	Garmisch, Germany	9–13 Oct 1988 14–17 Oct 1988 (Trial Advocacy) 17–21 Oct 1988
TCAP Seminar	Fort Lewis, WA	12–13 Oct 1988
TDS (Region III)	Fort Leavenworth, KS	October 1988
USAREUR Claims Regional Seminar	TBA	October 1988
TJAGSA On-Site	Minneapolis, MN	October 1988
USAREUR International Law Orientation	Heidelberg, Germany	October 1988
TJAGSA On-Site	St. Louis, MO	October 1988
USAREUR Magistrates Training Seminar	Mannheim, Germany	October 1988
TJAGSA On-Site	Boston, MA	October 1988
Judge Advocates Management Seminar	Berchtesgaden, Germany	21–23 Nov 1988
TCAP Seminar	Hawaii	November 1988
TJAGSA On-Site	Philadelphia, PA	November 1988
TJAGSA On-Site	Detroit, MI	November 1988
TJAGSA On-Site	Indianapolis, IN	November 1988
TDS Workshop (Region I)	Fort Dix, NJ	November 1988
USAREUR International Law Training Seminar	TBA	November 1988
USAREUR 5th Judicial Circuit Training Seminar	TBA	November 1988
TDS Workshop (Region V)	Presidio, San Fran.	6–8 Dec 1988
TCAP Seminar	San Antonio, TX	December 1988
TJAGSA On-Site	New York, NY	December 1988

4. Civilian Sponsored CLE Courses

October 1988

2–7: AAJE, Constructive and Creative Judicial Change, Durham, NH.
2–7: NITA, Advanced Trial Advocacy Program, Washington, D.C.
2–14: NJC, Special Court for Non-Attorney Judges, Reno, NV.
2–14: NJC, Special Court for Attorney Judges, Reno, NV.
3–7: SLF, Antitrust Law Short Course, Dallas, TX.

3–7: GCP, Contracting with the Government, Washington, D.C.

4–7: ESI, Contract Accounting and Financial Management, Washington, D.C.

6: UMC, Farm Law, Springfield, MO.

6–7: PLI, Equipment Leasing, New York, NY.

6–7: PLI, Securities Litigation, New York, NY.

6–7: ALIABA, Health Care in the '80s and Beyond, San Francisco, CA.

6–7: ALIABA, Securities Law for Nonsecurities Lawyers, San Francisco, CA.

6–8: PLI, Computer Law Institute, New York, NY.

7: UMC, Environmental Law, St. Louis, MO.

7–8: IICLE, Mortgage Foreclosure, Champaign, IL.

7–8: LSU, Maritime Personal Injury Seminar, Baton Rouge, LA.

9–14: NJC, Evidence for Non-Attorney Judges, Reno, NV.

11–12: IICLE, Corporate Counsel Institute, Chicago, IL.

12–13: ESI, Commercial Products Contracting, Washington, D.C.

13–14: SLF, Labor Law Institute, Dallas, TX.

13–14: PLI, Annual Estate Planning Institute, New York, NY.

13–15: ALIABA, Litigating Medical Malpractice Claims, Charleston, SC.

14: ALIABA, Public Speaking for Lawyers, Washington, D.C.

14–15: LSU, Louisiana Evidence and Trial Technique, Baton Rouge, LA.

16–20: NCDA, Prosecution of Violent Crime, Orlando, FL.

17–19: ALIABA, Bankruptcy: Critique of First Decade Under Bankruptcy Code, Williamsburg, VA.

17–21: GCP, Administration of Government Contracts, Washington, D.C.

18–21: ESI, Contract Pricing, Washington, D.C.

20–21: PLI, Managed Health Care, San Francisco, CA.

20–21: BNA, AIDS, Washington, D.C.

20–21: FBA, FBA Bankruptcy Seminar, Des Moines, IA.

20–21: PLI, Lender Liability Litigation, San Francisco, CA.

22–23: MLI, Psychological Disorders, Evaluation and Disability, San Francisco, CA.

27–28: BNA, Western Government Contracts, San Francisco, CA.

27–28: PLI, Immigration and Naturalization Institute, New York, NY.

28–29: LSU, Estate Planning Seminar, Baton Rouge, LA.

28–29: ALIABA, New England Antitrust Conference, Cambridge, MA.

29–30: MLI, The TMJ Injury and Dental Malpractice, Newport Beach, CA.

30–11/11: NJC: Administrative Law: Fair Hearing, Reno, NV.

31–11/1: PLI, Managing the Small Law Firm, New York, NY.

31–11/1: PLI, Managing the Medium-Sized Firm, New York, NY.

31–11/4: GCP, Cost Reimbursement Contracting, Washington, D.C.

5. Mandatory Continuing Legal Education Requirement

Twenty-eight states currently have a mandatory continuing legal education (MCLE) requirement.

In these MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7–16 (Oct. 1987) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most of these MCLE jurisdictions.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

State	Local Official	Program Description
*Alabama	MCLE Commission Alabama State Bar P.O. Box 671 Montgomery, AL 36101 (205) 269–1515	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt but must declare exemption annually. —Reporting date: on or before 31 December annually.
*Colorado	Colorado Supreme Court Board of Continuing Legal Education Dominion Plaza Building 600 17th St. Suite 520–S Denver, CO 80202 (303) 893–8094	—Active attorneys must complete 45 units of approved continuing legal education (including 2 units of legal ethics) every three years. —Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within three years. —Reporting date: 31 January annually.
Delaware	Commission of Continuing Legal Education 706 Market Street Wilmington, DE 19801 (302) 658–5856	—Active attorneys must complete 30 hours of approved continuing legal education per year. —Reporting date: on or before 31 July every other year.

State	Local Official	Program Description
Florida	The Florida Bar Tallahassee, FL 32301–8226 (904) 222–5286 (800) 874–0005 out-of-state	—Effective 1 January 1988. —Active attorneys must complete 30 hours of approved continuing legal education (including 2 hours of legal ethics). —Active duty military are exempt but must declare exemption during reporting period. —Reporting date: Assigned monthly deadlines, every three years.
*Georgia	Executive Director Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 (404) 527–8710	—Active attorneys must complete 12 hours of approved continuing legal education per year. Every three years each attorney must complete six hours of legal ethics. —Reporting date: 31 January annually.
*Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342–8959	—Active attorneys must complete 30 hours of approved continuing legal education every three years. —Reporting date: 1 March every third anniversary following admission to practice.
*Indiana	Indiana Commission for CLE Program State of Indiana 1800 N. Meridian Room 511 Indianapolis, IN 46202	—Attorneys must complete 36 hours of approved continuing legal education within a three-year period. —At least 6 hours must be completed each year. —Reporting date: 1 October annually.
*Iowa	Executive Secretary Iowa Commission of Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 281–3718	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 March annually.
*Kansas	Continuing Legal Education Commission Kansas Judicial Center 301 West 10th Street Room 23–S Topeka, KS 66612–1507 (913) 357–6510	—Active attorneys must complete 10 hours of approved continuing legal education each year, and 36 hours every three years. —Reporting date: 1 July annually.
*Kentucky	Continuing Legal Education Commission Kentucky Bar Association W. Main at Kentucky River Frankfort, Kentucky 40601 (502) 564–3793	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 30 days following completion of course.
*Louisiana	Louisiana Continuing Legal Education Committee 210 O'Keefe Avenue Suite 600 New Orleans, LA 70112 (504) 566–1600	—Effective 1 January 1988. —Active attorneys must complete 15 hours of approved continuing legal education every year. —Active duty military are exempt but must declare exemption. —Reporting date: 31 January annually beginning in 1989.
*Minnesota	Executive Secretary Minnesota State Board of Continuing Legal Education 200 So. Robert Street Suite 310 St. Paul, MN 55107 (612) 297–1800	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 30 June every third year.
*Mississippi	Commission of CLE Mississippi State Bar PO Box 2168 Jackson, MS 39225–2168 (601) 948–4471	—Attorneys must complete 12 hours of approved continuing legal education each calendar year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 31 December annually.

State	Local Official	Program Description
Missouri	The Missouri Bar The Missouri Bar Center 326 Monroe Street P.O. Box 119 Jefferson City, MO 65102 (314) 635–4128	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Implementation stayed until 1 July 1988 —Reporting date: 30 June annually beginning in 1988.
*Montana	Director Montana Board of Continuing Legal Education P.O. Box 577 Helena, MT 59624 (406) 442–7660	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 April annually.
*Nevada	Executive Director Board of Continuing Legal Education State of Nevada P.O. Box 12446 Reno, NV 89510 (702) 826–0273	—Active attorneys must complete 10 hours of approved continuing legal education each year. —Reporting date: 15 January annually.
*New Mexico	State Bar of New Mexico Continuing Legal Education Commission 1117 Stanford Ave., N.E. Albuquerque, NM 87125	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 January 1988 or first full report year after date of admission to Bar.
*North Carolina	The North Carolina State Bar Board of Continuing Legal Education 208 Fayetteville Street Mall P.O. Box 25909 Raleigh, NC 27611 (919) 733–0123	—Armed Service on full-time active duty exempt, but must declare exemption. —Reporting date 31 January annually (31 March in 1989 only). —12 hours beginning in 1988.
*North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58501 (701) 255–1404	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 February submitted in three year intervals.
*Oklahoma	Oklahoma Bar Association Director of Continuing Legal Education 1901 No. Lincoln Blvd. P.O. Box 53036 Oklahoma City, OK 73152 (405) 524–2365	—Active attorneys must complete 12 hours of approved legal education per year. —Active duty military are exempt, but must declare exemption. —Reporting date: 1 April annually, beginning in 1987.
Oregon	Oregon State Bar NCLE Administrator CLE Commission 5200 S.W. Meadows Road P.O. Box 1689 Lake Oswego, OR 97034–0889 (503) 620–0222 1–800–452–8260	—Must complete 45 hours in a three-year period. —Starting 1 January 1988.
*South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799–5578	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 10 January annually.
*Tennessee	Commission on Continuing Legal Education Supreme Court of Tennessee 3622–A West End Avenue Nashville, TN 37205 (615) 385–2543	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt. —Reporting date: 31 January.

State	Local Official	Program Description
*Texas	Texas State Bar Attention: Membership/CLE P.O. Box 12487 Capital Station Austin, TX 78711 (512) 463–1382	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: Depends on birth month.
*Vermont	Vermont Supreme Court Committee of Continuing Legal Education 111 State Street Montpelier, VT 05602 (802) 828–3279	—Active attorneys must complete 10 hours of approved legal education per year. —Reporting date: 30 days following completion of course. —Attorneys must report total hours every 2 years.
*Virginia	Virginia Continuing Legal Education Board Virginia State Bar 801 East Main Street Suite 1000 Richmond, VA 23219 (804) 786–2061	—Active attorneys must complete 8 hours of approved continuing legal education per year. —Reporting date: 30 June annually beginning in 1987.
*Washington	Director of Continuing Legal Education Washington State Bar Association 500 Westin Building 2001 Sixth Avenue Seattle, WA 98121–2599 (206) 448–0433	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 31 January annually.
*West Virginia	West Virginia Mandatory Continuing Legal Education Commission E–400 State Capitol Charleston, WV 25305 (304) 346–8414	—Attorneys must complete 6 hours of approved continuing legal education between 1 July 1986 and 30 June 1987; 6 hours between 1 July 1987 and 30 June 1988; and 24 hours every two years beginning 1 July 1988. —Reporting date: 30 June annually.
*Wisconsin	Supreme Court of Wisconsin Board of Attorneys Professional Competence 119 Martin Luther King, Jr. Boulevard Madison, WI 53703–3355 (608) 266–9760	—Active attorneys must complete 30 hours of approved continuing legal education every two years. —Reporting date: 31 December of even or odd years depending on the year of admission.
*Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003 (307) 632–9061	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.

Current Material of Interest

1. TJAGSA Material Available Through the Defense Technical Information Center.

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B112101	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–87–1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–87–2 (214 pgs).
AD B100234	Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211	Contract Law Seminar Problems/JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
AD B116100	Legal Assistance Consumer Law Guide/ JAGS–ADA–87–13 (614 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS–ADA–87–12 (339 pgs).
AD B116102	Legal Assistance Office Administration Guide/JAGS–ADA–87–11 (249 pps).
AD B116097	Legal Assistance Real Property Guide/ JAGS–ADA–87–14 (414 pgs).
AD A174549	All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).

AD B089092 All States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771 All States Law Summary, Vol I/JAGS–ADA–87–5 (467 pgs).
AD B094235 All States Law Summary, Vol II/JAGS–ADA–87–6 (417 pgs).
AD B114054 All States Law Summary, Vol III/JAGS–ADA–87–7 (450 pgs).
AD B090988 Legal Assistance Deskbook, Vol I/JAGS–ADA–85–3 (760 pgs).
AD B090989 Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128 USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857 Proactive Law Materials/JAGS–ADA–85–9 (226 pgs).
AD B116103 Legal Assistance Preventive Law Series/ JAGS–ADA–87–10 (205 pgs).
AD B116099 Legal Assistance Tax Information Series/ JAGS–ADA–87–9 (121 pgs).

Claims

AD B108054 Claims Programmed Text/JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849 AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).
AD B087848 Military Aid to Law Enforcement/JAGS–ADA–81–7 (76 pgs).
AD B100235 Government Information Practices/ JAGS–ADA–86–2 (345 pgs).
AD B100251 Law of Military Installations/JAGS–ADA–86–1 (298 pgs).
AD B108016 Defensive Federal Litigation/JAGS–ADA–87–1 (377 pgs).
AD B107990 Reports of Survey and Line of Duty Determination/JAGS–ADA–87–3 (110 pgs).
AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS–ADA–86–9 (146 pgs).

Labor Law

AD B087845 Law of Federal Employment/JAGS–ADA–84–11 (339 pgs).
AD B087846 Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/JAGS–DD–84–1 (55 pgs).
AD B088204 Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs.)

Criminal Law

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).
AD B100212 Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 37–100–89	The Army Management Structure (AMS) Vol. I and Vol. II		Mar 88
AR 635–100	Personnel Separations Officer Personnel	101	28 Apr 88
AR 672–20	Decorations, Awards, and Honors Incentive Awards	104	28 Apr 88
CIR 611–88–1	Implementation of Changes to the Military Occupational Classification Structure (MDCS)		29 Apr 88
CIR 718–88–1	Secretary of Army Award for Significant Contributions to the Small Disadvantaged Business Utilization Program		29 Apr 88
PAM 700–142	Instructions for Materiel Release, Fielding and Transfer		18 May 88
UPDATE 12	Message Address Directory		29 Apr 88

3. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Boettcher, *Voluntary Intoxication: A Defense to Specific Intent Crimes*, 65 U. Det. L. Rev. 33 (1987)
Cain, *Jar Wars: Drug Testing Advice for Private Sector Employers*, 37 Def. L.J. 257 (1988)
Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 Tex. Int'l. L.J. 1 (1988)
Gersten, *The Constitutionality of Executing Juvenile Offenders: Thompson v. Oklahoma*, 24 Crim. Law Bull. 91 (1988)
Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 Yale J. Int'l L. 5 (1988)
Green, *The Ethical Prosecutor and the Adversary System*, 24 Crim. Law Bull. 126 (1988)
Hoffman, *Court-Martial Jurisdiction and the Constitution: An Historical and Textual Analysis*, 1988 Creighton L. Rev. 43
Lowe, *Modern Sentencing Reform: A Preliminary Analysis of the Proposed Federal Sentencing Guidelines*, 25 Am. Crim. L. Rev. 1 (1987)
Paust, *The Link Between Human Rights and Terrorism and its Implications for the Law of State Responsibility*, 11 Hastings Int'l & Comp. L. Rev. 41 (1987)
Susser, *Drug Testing in a Unionized Environment*, 13 Employee Relations L.J. 599 (1988)
Wiseman, *Invasion by Polygraph: An Assessment of Constitutional and Common Law Parameters*, 32 St. Louis U.L.J. 27 (1987)

*U.S. G.P.O. 1988-201-420:80306

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